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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1994

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
HEADWATERS, INC. AND
UMPQUA VALLEY AUDUBON SOCIETY, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The Ninth Circuit ruled that the Secretary of the Interior could designate 6,887,000 acres of critical habitat for the northern spotted owl under the Endangered Species Act ("ESA") without complying with the National Environmental Policy Act ("NEPA").

The questions presented are:

1. Whether ESA procedures for designating critical habitat implicitly "displace" NEPA requirements, even though there is no conflict between the two statutes and this Court and six circuits have held that federal agencies must comply with NEPA unless there is an irreconcilable conflict with another statute.

2. Whether NEPA contains an implied exemption for federal actions "that preserve the physical environment" which excuses the Secretary from NEPA compliance on a critical habitat designation regardless of its environmental effects.

PARTIES TO THE PROCEEDING

Douglas County, Oregon, a municipal corporation and political subdivision of the state of Oregon, was the appellee in the court of appeals. Appellants in the court of appeals were Bruce Babbitt, Secretary of the Interior, defendant in the district court, and Headwaters, Inc. and Umpqua Valley Audubon Society, defendant-intervenors in the district court. In the district court Coos County, Oregon, Josephine County, Oregon and Klamath County, Oregon were plaintiff-intervenors, but they did not participate in the court of appeals.

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In the Supreme Court of the United States

October Term, 1994

No.

Douglas County, Oregon, Petitioner

v.

Bruce Babbitt, Secretary of the Interior,
Headwaters, Inc. and
Umpqua Valley Audubon Society, Respondents

Douglas County, Oregon[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App."), *infra*, 1a-28a) is reported at 48 F.3d 1495 (9th Cir. 1995). The opinion of the district court (App., *infra*, 29a-58a) is reported at 810 F. Supp. 1470 (D. Or. 1992).

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[1] Douglas County, a municipal corporation and political subdivision of the state of Oregon, has no parent company or subsidiaries.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995. A petition for rehearing was denied on June 5, 1995. App., *infra*, 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 3(5), 4(a)(3),(b)(2), (b)(5), (b)(6)(A), (b)(6)(C) and 7(a)(2) of the Endangered Species Act, 16 U.S.C. 1532(5), 1533(a)(3), (b)(2), (b)(5), (b)(6)(A), (b)(6)(C), and 1536(a)(2), and Section 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(C), are reprinted at App., *infra*, 61a-67a.

STATEMENT OF THE CASE

1. ESA critical habitat.

The U.S. Fish and Wildlife Service ("FWS") implements the Endangered Species Act, 16 U.S.C. 1531 *et seq.* ("ESA"), along with the National Marine Fisheries Service ("NMFS"). Under the ESA, FWS or NMFS must designate "critical habitat" for species listed as threatened or endangered by adopting a rule either concurrent with listing or within two years after listing. 16 U.S.C. 1533(b)(6)(C), App. 64a.

Critical habitat means "specific areas . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections." 16 U.S.C. 1532(5)(A), App. 61a. The Secretary has considerable discretion in designating the critical habitat: "The

Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [extinction will result]." 16 U.S.C. 1533(b)(2), App. 62a.

Once critical habitat is designated, every federal agency must "insure that any action authorized, funded, or carried out by such agency . . . is not likely to . . . result in the destruction or adverse modification of [critical habitat]." 16 U.S.C. 1536(a)(2), App. 65a.

To designate critical habitat, FWS or NMFS is required under ESA to publish a notice and text of the proposed rule in the Federal Register; give actual notice to affected states, counties, foreign states and scientific organizations; publish a summary of the rule in a newspaper of general circulation in each affected area; hold a public hearing if requested; accept public comment on the proposed rule and issue a final rule. 16 U.S.C. 1533(b)(5), (6), App. 62a-64a.

2. NEPA.

NEPA requires federal agencies to include in every major federal action significantly affecting the quality of the human environment an "environmental impact statement" ("EIS") describing the environmental impact of the action, adverse environmental effects, alternatives to the proposed action and other information. 42 U.S.C. 4332(2)(C), App. 66a.

The Council on Environmental Quality ("CEQ") has issued binding regulations detailing the required NEPA process. 40 C.F.R. Part 1500. Unless an action is "categorically excluded," 40 C.F.R. 1501.4(a), an agency must prepare an environmental assessment ("EA") for every action, 40 C.F.R. 1501.4(b), to determine if an EIS is required. The EA must include alternatives. 40 C.F.R.

1508.9(b). If the agency finds in the EA that the proposed action is a major federal action significantly affecting the quality of the human environment, an EIS is required. 40 C.F.R. 1501.4(c).

3. Administrative practice under NEPA for critical habitat designations.

a. NMFS. In 1980 NMFS announced the policy that critical habitat decisions "will normally require preparation of an EA. If the EA reveals that the action will have significant environmental impacts, preparation of an EIS is required." 45 Fed. Reg. 49,312, 49,315 (July 24, 1980).

NMFS continues to prepare EAs for major critical habitat proposals. *See* 57 Fed. Reg. 57,051, 57,055 (December 2, 1992) (proposal to designate critical habitat for Snake River salmon); 58 Fed. Reg. 68,543, 68,544 (December 28, 1993) (same).

b. FWS. Until 1983 FWS also prepared EAs on listing and critical habitat proposals, but in 1983 announced that it would no longer do so. 48 Fed. Reg. 49,244 (October 25, 1983). It has maintained that practice since 1983.

4. This case.

a. The northern spotted owl critical habitat proposal. In May 1991 the FWS published a proposal to designate 11,639,195 acres of critical habitat in Oregon, Washington and California for the northern spotted owl. App. 5a. In August 1991 FWS published a revised proposal to designate 8,240,160 acres of critical habitat for the owl. *Id.* On January 15, 1992 FWS published a final rule designating 6,887,000 acres of federal land in the three states as critical habitat for the owl. *Id.*

The initial May 1991 proposal contained an announcement that the FWS was not required to prepare an EA or EIS for the decision, App. 5a, and that it would not. *Id.* No EA or EIS was ever prepared on the critical habitat designation. App. 6a.

b. Douglas County's involvement. Douglas County is located in heavily forested southwestern Oregon within the range of the northern spotted owl. Its 4,140 acres of county-owned lands are contiguous to or within national forest land, 64% of its annual operating budget is derived from federal timber sale receipts, and much of its property tax base is tied to the forest products industry.

Douglas County commented on the May 1991 proposal, urging the FWS to comply with NEPA. App. 31a. Douglas County particularly urged the FWS to develop "alternatives to the proposed action," as required in 42 U.S.C. 4332(2)(C) and 42 U.S.C. 4332(E), which would lessen adverse environmental, economic and social impacts on Douglas County. Upon being advised that FWS did not intend to comply with NEPA, Douglas County thereafter sued the Secretary of the Interior in the district court for the district of Oregon seeking declaratory and injunctive relief based on the FWS' failure to comply with NEPA in making the critical habitat designation. App. 33a.[2]

c. The district court decision. Douglas County won in the district court. App. 57a. The district court ruled that Douglas County has standing to sue, App. 40a, and ruled on the merits that the FWS is obligated to comply with NEPA before making a critical habitat designation. App. 56a. The court rejected the agency's argument that the ESA implicitly

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[2] Jurisdiction was premised on 28 U.S.C. 1331.

amended or repealed NEPA to excuse compliance on critical habitat decisions.

The district court relied on this Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma ("Flint Ridge")*, 426 U.S. 776, 787-88 (1976), to hold that "all federal agencies are required to comply with NEPA when considering major federal actions that significantly affect the quality of the human environment unless there is a clear and unavoidable statutory conflict." App. 56a. Finding no such conflict, the court held that NEPA applies. App. 57a.

d. The Ninth Circuit decision. The Ninth Circuit agreed that Douglas County has standing, App. 13a, but reversed the district court on the merits. App. 28a. The court of appeals acknowledged that there is no express or irreconcilable statutory conflict between NEPA and the ESA critical habitat process. App. 15a. Nonetheless, the court ruled that NEPA does not apply because in amending the ESA critical habitat process in 1978 Congress had implicitly "displaced" and therefore repealed NEPA with respect to critical habitat designations. App. 16a. The court also found that NEPA compliance is unnecessary in this case because ESA and NEPA further similar environmentally protective goals. App. 25a. Alternatively, the court ruled that NEPA does not apply to critical habitat designations as a matter of law because it implicitly exempts actions "that preserve the physical environment." App. 24a.

5. Related litigation in another circuit.

Based on the district court decision in this case, the district court for the district of New Mexico has enjoined the FWS from designating critical habitat for two listed species in that state until it complies with NEPA. *Catron County*

Board of Commissioners v. U.S. Fish and Wildlife Service, Civil No. 93-730-HB (D.N.M. slip op. October 13, 1994) ("[t]he Court finds the analysis in *Douglas County* persuasive . . . ."). An appeal to the court of the appeals for the Tenth Circuit is pending. *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, No. 94-2280. Briefing is complete, but oral argument has not been scheduled.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of certiorari because the court of appeals decision is inconsistent with this Court's ruling in *Flint Ridge* and conflicts with six other courts of appeals on the issue of a federal agency's duty to comply with NEPA in the absence of irreconcilable conflict with another statute, the case presents an important and recurring issue of national significance, and the decision below was wrongly decided.

I. THE NINTH CIRCUIT DECISION CONFLICTS WITH THIS COURT'S DECISION IN *FLINT RIDGE* AND WITH SIX OTHER COURTS OF APPEALS THAT HAVE REQUIRED FEDERAL AGENCIES TO COMPLY WITH NEPA UNLESS THERE IS AN IRRECONCILABLE CONFLICT WITH ANOTHER STATUTE.

The court of appeals in this case applied a rule of interpretation of NEPA that is flatly inconsistent with this Court's decision in *Flint Ridge*, and is in conflict with the courts of appeals for the District of Columbia, First, Third, Fifth, Sixth and Tenth circuits. This Court should grant certiorari to resolve this conflict.

A. The decision below conflicts with *Flint Ridge*.

In *Flint Ridge*, this Court addressed an agency's claim that it could not comply both with NEPA and another statute. This Court found that NEPA's direction that all agencies comply "to the fullest extent possible," 42 U.S.C. 4332, "is neither accidental nor hyperbolic:"

> "the purpose of the new language is to make it clear that each agency of the Federal Government *shall* comply with the directives set out in [§ 102(2)] *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . ." 115 Cong. Rec. 39703 (1969). . . .
>
> Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authorization exists, NEPA must give way. . . . And so **the question we must resolve is whether**, assuming an environmental impact statement would otherwise be required in this case, **requiring the Secretary to prepare such a statement would create an irreconcilable and fundamental conflict with her duties under [another statute].**

Id., 426 U.S. at 787-88 (quoted italics in original, emphasis added). *Flint Ridge* interprets NEPA to direct that an agency can be excused from complying with NEPA **only** where "an irreconcilable and fundamental conflict" exists with another statute. The court found such a conflict in that case due to a 30 day decision deadline in the other statute which did not

allow time for an EIS, and held NEPA compliance excused. *Id.* at 788-91.

B. The decision below conflicts with rulings of six other circuits.

The other courts of appeals have uniformly agreed, both before and after *Flint Ridge*, that NEPA's "to the fullest extent possible" directive requires agencies to comply with NEPA unless a direct and unresolvable conflict exists with another statute. The earliest such ruling came from the D.C. Circuit in *Calvert Cliffs' Coord. Com. v. United States A.E. Com'n*, 449 F.2d 1109 (D.C. Cir. 1971), which held that NEPA must be complied with "unless there is a clear conflict of *statutory* authority," *id.* at 1115 (emphasis in original, footnote omitted), adding that only when "specific statutory obligations . . . conflict with NEPA do agencies have a right . . . to dilute their compliance with the full letter and spirit of the Act." *Id.* at 1115 n.12.

Other circuits followed *Calvert Cliffs'*. In *Environmental Defense Fund v. Tennessee Val. Auth.*, 468 F.2d 1164 (6th Cir. 1972), the court rejected an agency claim of implicit repeal of NEPA by a later appropriations act, holding that "section 102 [of NEPA] exempts agencies from compliance only when other statutory authority under which the agencies are proceeding expressly precludes compliance." *Id.* at 1176 (emphasis added).

In *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972), the court rejected an agency's argument that an amendment to 25 U.S.C. 415, requiring the Secretary of the Interior to consider "the effect on the environment" before approving a lease on Indian land, implicitly repealed NEPA, holding that "unless the obligations of another statute are **clearly mutually exclusive** with the mandates of NEPA, the specific

requirements of NEPA will remain in force." *Id.* at 598 (emphasis added).

In *State of Louisiana v. Federal Power Commission*, 503 F.2d 844 (5th Cir. 1974), the court rejected the agency's attempt to avoid complying with NEPA on a natural gas curtailment plan, holding that "an agency contemplating taking an action that will have a significant effect on the environment must file the best impact statement possible unless filing will conflict with a statutory duty. In the absence of a **statutory conflict**, some sort of impact statement must be drafted." *Id.* at 875 (emphasis added).

Following *Flint Ridge*, the courts of appeals continued with the same view of NEPA fortified by this Court's treatment of the issue. In *Concerned About Trident v. Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1977), the court rejected the agency's plea to create an implied national defense exception to NEPA, holding that "[t]he **only time** that a federal agency can avoid [NEPA] is when a **clear and unavoidable conflict in statutory authority exists**." *Id.* at 823 (emphasis added); *accord, Izaak Walton League of America v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981) (applying *Flint Ridge* to hold that "clear conflict must be found before NEPA gives way").

In *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201 (5th Cir.), *cert. denied* 439 U.S. 966 (1978), the court applied *Flint Ridge* to reject an agency's plea to avoid NEPA compliance in adopting new forest management rules, holding that "[t]he conflict between the agency's organic statute and NEPA must be both fundamental and irreconcilable." *Id.* at 206.

The First Circuit agreed in *Public Serv. Co. v. U.S. Nuclear Regulatory Com'n*, 582 F.2d 77 (1st Cir.), *cert. denied* 439 U.S. 1046 (1978), holding that NEPA applies

"except when specifically excluded by statute or when existing law makes compliance with NEPA impossible." *Id.* at 81. The Third Circuit concurred in *Limerick Ecology Action v. U.S. Nuc. Reg. Com'n*, 869 F.2d 719 (3d Cir. 1989), rejecting the agency's claim that its own statute made NEPA compliance unnecessary, holding that "compliance with NEPA is required unless specifically excluded by statute or existing law makes compliance impossible." *Id.* at 729.

Indeed, in the past the Ninth Circuit had itself seemed to adopt this view. In *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), the court enforced NEPA in the face of a statute imposing a short deadline because NEPA compliance, though difficult, was not impossible. It observed that "*Flint Ridge* applies only when a conflict is 'clear and unavoidable' and 'irreconcilable and fundamental.'" *Id.* at 826.

C. The decision below cannot be reconciled with *Flint Ridge* or the decisions in the six other circuits.

The decision by the court of appeals in this case directly conflicts with *Flint Ridge* and the six courts of appeals that have followed its "irreconcilable conflict" rule. The court below instead applied a very different interpretative rule, which it labelled "displacement," to find an implied repeal of NEPA by ESA.

The district court had ruled that "NEPA applies to every major federal action absent a clear and unavoidable statutory conflict," App. 56a, and, finding no conflict, enforced NEPA. The court of appeals reversed, stating "[w]e do not think this is an accurate description of Ninth Circuit law." App. 27a. The court implicitly dismissed *Flint Ridge*, which had been followed in its own earlier decision in *Jones v. Gordon*, 792 F.2d 821, by commenting "in *Jones* we do not

state that the finding of irreconcilable conflict is the only way to avoid the NEPA provisions . . . ." App. 21a.

This is the key error in the court of appeals decision which brings it into conflict with *Flint Ridge* and the six other courts of appeals. In *Flint Ridge*, this Court states that existence of "an irreconcilable and fundamental conflict" is "the question we **must resolve**." 426 U.S. at 788 (emphasis added). The court of appeals, however, improperly held that this issue is not determinative of whether compliance with NEPA is required.

In *Calvert Cliffs'*, *Environmental Defense Fund*, *Davis*, *State of Louisiana*, *Concerned About Trident*, *Izaak Walton League of America*, *Texas Committee on Natural Resources*, *Public Serv. Com'n* and *Limerick Ecology Action*, six different courts of appeals directly held that "irreconcilable conflict" is the **only** basis for avoiding NEPA compliance, and ordered agencies to comply with NEPA because no such conflict existed. *See supra* at 9-11.

The decision by the court of appeals below conflicts with all of these decisions. It also directly conflicts, on the ESA critical habitat issue, with the district of New Mexico's decision in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, Civil No. 93-730-HB.[3]

In the Ninth Circuit federal agencies are now free to assert NEPA exemptions in the absence of any irreconcilable conflict, based on vague "displacement" arguments like that accepted here. The vast amount of public land within the

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[3] While a Tenth Circuit decision in *Catron County* affirming the district court might create an even clearer conflict, Douglas County respectfully seeks certiorari now since if this case ends before the Tenth Circuit rules it would be too late for Douglas County to revive its case and obtain the benefit of any Supreme Court review that might follow the Tenth Circuit decision.

Ninth Circuit means that thousands of agency decisions may now be vulnerable to NEPA avoidance. This Court should grant a writ of certiorari to resolve the conflict the decision below has created with *Flint Ridge* and six other circuits on this important issue.

II. THIS CASE PRESENTS AN IMPORTANT AND RECURRING ISSUE OF NATIONAL SIGNIFICANCE.

This issue in this case is an important and recurring issue with nationwide application. Listings of threatened and endangered species have accelerated throughout the country in recent years, and critical habitat is now being designated for hundreds of species. The legal issue whether FWS must comply with NEPA in designating critical habitat for these species is present in every case.

The New Mexico *Catron County* case has already presented the same issue in one case, and there is every reason to expect citizens in many other parts of the country to seek to obtain the participatory rights conferred by NEPA in future critical habitat designations.

This Court should grant certiorari to resolve this important issue.

III. THE DECISION BELOW IS WRONGLY DECIDED.

In addition to creating conflict with *Flint Ridge* and confict between circuits, the court of appeals decision below is wrongly decided and should be reversed. The court below relied on only two cases, but neither supports its position.

The court also misinterpreted the legislative history of the 1978 ESA amendments that created the current critical habitat process, misunderstood agency practices, and misapplied rules of statutory construction.

A. No case law support.

The court below found that Congress had by implication "displaced" NEPA requirements when it amended the ESA in 1978 to add the current procedural requirements to the critical habitat designation process. The court based its "displacement" doctrine on its earlier decision in *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), *cert. denied* 484 U.S. 848 (1987). In that case Congress had enacted a procedure for registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. 136-136y, with special rules relating to public participation, a requirement for a decision in 90 days, and development of alternatives, all of which directly conflicted with NEPA's key requirements. *Id.* at 777-81. Both houses of Congress had passed new legislation expressly eliminating NEPA procedures, *id.* at 780, and ample legislative history showed a clear congressional intent for NEPA not to apply. *Id.*

The *Merrell* court found, as in *Flint Ridge*, that the short decision deadline conflicts with NEPA, and it also found clear congressional intent supporting that conclusion. *Merrell*'s "displacement" theory was simply a way of explaining the statutory conflict. *Merrell* is inapplicable here because the court of appeals acknowledged in this case that "time constraints alone would not prevent the Secretary from preparing an EIS." App. 15a.

The court unjustifiably expanded *Merrell*'s "displacement" doctrine by finding that NEPA compliance would

"sabotage" ESA procedures that are nothing more than garden variety notice and comment rulemaking procedures, and can easily be harmonized with NEPA. The Administrative Procedure Act ("APA"), 5 U.S.C. 553, requires every federal agency to follow these common procedures whenever a new regulation is adopted. Agencies have spent a quarter century learning how to integrate NEPA compliance with APA procedures, as Congress commanded. *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981). Under the court of appeals' reasoning, no agency would have to comply with NEPA if it is required to follow APA notice and comment procedures. This plainly violates the "fullest extent possible" directive in NEPA.

The other case relied on by the court below is *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981), which held that there is a statutory conflict between NEPA and the ESA process for listing a species as threatened or endangered, *id.* at 835, and that NEPA therefore does not apply. The court in that case reasoned that since ESA limits listing decisions to five biological criteria and precludes consideration of any other factor, an EIS would not fulfill any purpose under ESA or NEPA. *Id.* at 836-37.

Pacific Legal Foundation may be inconsistent with *Flint Ridge* and the other courts of appeals in permitting an agency to avoid NEPA in the absence of irreconcilable conflict with another statute. Yet whatever its merits may be, *Pacific Legal Foundation* does not support the decision in this case because unlike the strict biological limitations on the ESA listing process, Congress allows the critical habitat designation to "tak[e] into consideration the economic impact, and **any other relevant impact**, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2) (emphasis added).

The court of appeals also relied on *Pacific Legal Founda-*

tion to suggest that NEPA compliance is unnecessary in this case because "ESA furthers the goals of NEPA without demanding an EIS." App. 25a. The court did not explain why this observation would support a NEPA exemption.

The observation is both irrelevant and wrong. It is irrelevant because courts cannot judge a statute "unnecessary" — courts are obligated to enforce each of two applicable statutes, in the absence of irreconcilable conflict. *Watt v. Alaska*, 451 U.S. 259, 267 (1981). Several courts have refused to imply a NEPA exemption from other statutes that are also intended to protect the environment. *Limerick Ecology Action v. U.S. Nuc. Reg. Com'n*, 869 F.2d at 729; *Davis v. Morton*, 469 F.2d at 598.

The court's contention was also wrong. The ESA's goals are not the same as NEPA's. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 and n.14 (1989). The ESA seeks to protect rare species and their habitats. NEPA is an informational law that "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

For this reason, NEPA can work smoothly with the ESA critical habitat process, providing the FWS with important information on the environmental, economic and social impacts of a critical habitat proposal that assists the agency to "tak[e] into consideration the economic impact, and any other relevant impact" in making the decision. Without NEPA, nothing in the ESA process assures that the agency will have access to the broad range of information provided by an EIS. NEPA also requires a range of alternatives that assures the agency gives full consideration to different approaches to achieving ESA's goals. In this case Douglas County was particularly interested in reviewing and analyzing

alternative critical habitat plans, but none were developed because there was no NEPA compliance.

Neither *Merrell*, *Pacific Legal Foundation* nor any other case supports the court of appeals decision.

B. No legislative history support.

The court below cited no legislative history showing that Congress intended the ESA critical habitat process to displace NEPA. To the contrary, there are only three relevant pieces of legislative history on the 1978 ESA amendments, and all three suggest congressional intent that NEPA would apply to critical habitat decisions:

1. Senator McClure introduced an amendment to automatically require an EIS for every critical habitat decision. Senator Wallop, a manager of the bill, opposed the amendment because he believed an EIS should only be required for those designations that qualify as a major federal action (as NEPA now requires). He stated that the ESA "surely does not prohibit suits to compel that environmental impact statements be filed under the provisions of NEPA if the action is determined to be a major federal action." 120 Cong. Rec. 21589 (July 19, 1978); *see* App. 54a (district court discussion of legislative history). Senator McClure withdrew his amendment, agreeing with Senator Wallop's view. *Id.*

2. The conference report on the 1978 ESA amendments states: "Where critical habitat is specified, . . . [a]ctual notice of the regulation **and any environmental assessment or environmental impact statement prepared on it** is required to be given . . . . H. Rep. 1804 (95th Cong., 2d Sess.) at 27, *reprinted at* [1978] U.S. Code. Cong. & Admin. News 9494.

3. In the same amendments, Congress granted an explicit NEPA exception to decisions of the newly-formed Endangered Species Committee, 16 U.S.C. 1536(k), *see* H. Rep. 1804 (95th Cong., 2d Sess.) at 23, *reprinted at* [1978] U.S. Code. Cong. & Admin. News 9490. The grant of one express NEPA exemption in the amendment strongly implies an absence of implied exemption elsewhere in the same amendment. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980) (enumeration of exceptions in statute precludes implication of additional exceptions in absence of contrary legislative intent).

Nothing in the legislative history supports the court of appeals' inference that Congress intended to exempt critical habitat decisions from NEPA.

C. No congressional ratification of conflicting agency interpretations.

1. The court of appeals was not aware of the conflicting agency practices.

The court below also mistakenly believed that in 1988, when Congress amended the ESA in certain unrelated aspects but did not amend the ESA to require NEPA compliance, it ratified the FWS policy not to comply with NEPA on critical habitat designations, which had been announced in 1983. App. 19a. The court was evidently not aware that since at least 1980, FWS' sister enforcement agency, NMFS, has consistently complied with NEPA on critical habitat decisions. NMFS has never interpreted ESA to preclude NEPA compliance. Thus, Congress' failure to amend ESA in 1988 could as likely reflect approval of the NMFS practice as the FWS practice.

2. The court of appeals misapplied ruled of statutory interpretation.

Apart from its misunderstanding of agency practices, the court below also misapplied three rules of statutory interpretation in finding that Congress approved the agency practices when it failed to amend the ESA in 1988:

a. There is no evidence Congress was aware of FWS or NMFS policy on NEPA compliance in 1988. Without evidence of such knowledge, subsequent congressional action or inaction on the statute can not be construed as endorsement of the agency policy. *Brown v. Gardner*, — U.S. —, 115 S. Ct. 552, 556-57, 130 L. Ed. 2d 462, 468 (1994).

b. The mere fact that Congress did not take up the issue of NEPA compliance on critical habitat in 1988 shows nothing about that Congress' view of the existing agency interpretations. "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval . . . ." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. —, 114 S. Ct. 1439, 128 L. Ed. 2d 119, 138 (1994) (quotation omitted).

c. Congressional acquiescence cannot be inferred when Congress does not reenact the statute in question. *Central Bank of Denver*, 128 L. Ed. 2d at 137. Congress did not reenact the ESA in 1988. It amended the law in certain limited ways not relating to designation of critical habitat. Thus, no congressional action or inaction in 1988 can validate any agency interpretation of the earlier law.

For these reasons Congress' failure to amend the ESA in 1988 in no way confirms the existence of an implied NEPA exemption for critical habitat designations.

IV. THE COURT OF APPEALS' ALTERNATIVE RULING EXCUSING NEPA COMPLIANCE FOR ACTIONS THAT "PRESERVE THE ENVIRONMENT" SIMILARLY CONFLICTS WITH *FLINT RIDGE* AND OTHER COURT OF APPEALS DECISIONS.

The court below bolstered its displacement doctrine by embracing the argument of the environmental intervenors — an argument the Secretary did not adopt or endorse — that NEPA has an implied exemption for what the court variously described as "an action that prevents human interference with the environment," App. 24a, or "actions that do nothing to alter the natural physical environment," App. 22a, or "actions that preserve the physical environment." App. 21a. The court ruled that the critical habitat designation in this case is exempt from NEPA because it is such an action, and for this reason the agency is not required to prepare an EA or an EIS. App. 24a.

A. The Secretary did not join this argument.

Significantly, the Secretary never endorsed or joined this argument, which was presented by intervenor Headwaters, Inc. App. 24a.

The Secretary could not join this argument because his agency and other federal agencies regularly comply with NEPA procedures before taking actions "to preserve the environment." *See Hovsons, Inc. v. Secretary of the Interior*, 711 F.2d 1208 (3d Cir. 1983) (EIS prepared for plan for National Park Service unit); *County of Josephine v. Watt*, 539 F. Supp. 696, 699 (N.D. Cal. 1982) (EIS prepared on designation of wild and scenic river); *Hogan v. Brown*, 507

F. Supp. 191, 204 (W.D. Ark.), *aff'd*, 665 F.2d 849 (8th Cir. 1981) (EIS prepared for plan to preserve forest lands for wildlife). As the Secretary does not endorse this interpretation of NEPA, it deserves no deference.

B. The court exempted the designation in this case from NEPA despite recognizing its environmental impacts.

The court found a statutory exemption in this case despite recognizing the environmental effects of the 6,887,000 acre critical habitat designation here. In upholding Douglas County's standing the court of appeals found that the county owns land "adjacent to the critical habitat," App. 12a, that federal land management practices on areas of critical habitat could affect the county lands "[b]y failing to properly manage for insect and disease control and fire," App. 12a, and that these effects on county land are "'reasonably probable.'" App. 13a n.6. The district court found that "defendant's designation of critical habitat will profoundly affect the quality of life in Douglas County." App. 39a. The court of appeals did not upset that finding.

The CEQ regulations require NEPA analysis for "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. 1508.8 (definition of "effects"). The potentially drastic effects on Douglas County's land from this critical habitat designation are within NEPA's reach. Thus, whether or not a critical habitat designation is viewed as an action "to preserve the physical environment" the record shows that the designation in this case will have significant environmental effects on Douglas County's land.

C. NEPA requires agencies to prepare an EA to determine if a project has significant environmental impacts.

The court of appeals did not find factually that the 6,887,000 acre designation in this case has no significant environmental effects, and under NEPA that is not a role for courts to perform. The CEQ regulations require a federal agency, not a court, to factually determine through the EA process whether a project has significant environmental effects. 40 C.F.R. 1508.9. The federal courts' role is limited to reviewing agency decisions on NEPA compliance under the deferential arbitrary and capricious standard. *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 375-76 (1989).

Under NEPA, if an agency prepares an EA which reasonably finds that a proposed action will not result in significant environmental impacts, it need not prepare an EIS. Some actions "that preserve the physical environment" will therefore not require an EIS. *See, e.g., Sabine River Authority v. U.S. Department of Interior*, 951 F.2d 669 (5th Cir.), *cert. denied sub nom Texas Water Conservation Ass'n v. Department of the Interior*, — U.S. —, 113 S. Ct. 75 (1992) (upholding agency conclusion in EA that accepting negative land easement would not result in significant environmental impacts).

In other cases an EA may reveal that actions that initially appear to "preserve the environment" may cause drastic and undesirable environmental effects on the land in question as well as adjacent private land, as in this case, by preventing fire or flood control or insect management. *See County of Josephine v. Watt*, 539 F. Supp. at 699. In those cases NEPA requires an EIS.

An EA is required to contain alternatives, 40 C.F.R. 1508.9(b), which can influence an agency decision even if no EIS is necessary.

D. No statutory NEPA exemption exists for actions that preserve the environment.

The court's discovery of an implied statutory exemption in NEPA for "actions that preserve the physical environment" applies even if such actions have significant environmental effects. This implied exemption to NEPA fares no better under *Flint Ridge* than the court's "displacement" exception, and equally conflicts with the six courts of appeals that have held implied exemptions to NEPA prohibited by the "to the fullest extent possible" directive in 42 U.S.C. 4332.

Flint Ridge precludes the creation of this implied exemption under NEPA. *Flint Ridge* requires agencies to study environmental impacts in the NEPA process "to the fullest extent possible" except where there is "an irreconcilable and fundamental conflict" with another statute. Neither NEPA nor any other statute exempts actions that preserve the environment if those actions cause significant environmental effects. The court's implied exemption for actions "that preserve the physical environment" conflicts with *Flint Ridge* and six other courts of appeals as shown above. The court should grant the writ of certiorari to resolve this conflict with *Flint Ridge*, and to correct the error of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 1st day of September, 1995.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-36013, 93-16016

DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, PLAINTIFF-APPELLEE.

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANT-APPELLANT.

DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, PLAINTIFF-APPELLEE,

v.

BRUCE BABBITT, DEFENDANT,

and

HEADWATERS, INC.; UMPQUA VALLEY AUDUBON SOCIETY, DEFENDANTS-INTERVENORS-APPELLANTS.

Argued and Submitted Jan. 9, 1995
Decided Feb. 24, 1995

Appeals from the United States District Court for the District of Oregon.

Before: PREGERSON and TROTT, Circuit Judges, and FITZGERALD, Senior District Judge.*

PREGERSON, Circuit Judge:

I. OVERVIEW

Secretary of the Interior Bruce Babbitt (the Secretary) and interveners, Headwaters, Inc. and Umpqua Valley Audubon Society (Headwaters), appeal the district court's grant of summary judgment in favor of Douglas County, Oregon (the County), in the County's action alleging that the Secretary failed to comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*, in designating certain federal land as critical habitat for the Northern Spotted Owl pursuant to the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1533(a)(3). The district court granted the County permanent injunctive relief, setting aside the critical habitat designation, but then stayed its order pending appeal. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand for consideration.

* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

II. BACKGROUND

A. The Statutory Framework.

1. The Endangered Species Act.

Under § 4(a) of the ESA, 16 U.S.C. § 1533(a), the Secretary[1] may list a species as threatened or endangered. When the Secretary lists a species, he or she must also designate a "critical habitat" for that species. 16 U.S.C. § 1533(a)(3). The ESA defines "critical habitat" as the geographical areas "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). The Secretary must decide what area to designate as a critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The ESA requires the Secretary to follow a clear set of procedures for public notification and comment after he or she designates a critical habitat. 16 U.S.C. § 1533(b)(4)-(6). The effect of designating an area as a critical habitat is that federal actions that are likely to destroy or disrupt the habitat are prohibited. 16 U.S.C. § 1536(a)(2).

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[1] The Fish & Wildlife service (FWS) is an entity within to Department of the Interior. To avoid confusion regarding the parties, in this opinion we will attribute any FWS action to the Secretary of the Interior (the Secretary).

2. The National Environmental Policy Act.

Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires "to the fullest extent possible," that "all agencies of the Federal Government" shall

> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

The above describes the requirements for an environmental impact statement (EIS). The EIS is "a procedural obligation designed to assure that agencies give proper consideration to the environmental consequences of their actions." *Merrell v. Thomas,* 807 F.2d 776, 777-78 (9th Cir.1986), *cert. denied,* 484 U.S. 848, 108 S.Ct. 145, 98 L.Ed.2d 101 (1987). The EIS also insures that the public is informed about the environmental impact of proposed agency actions. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989). An environmental assessment (EA) is a document used to decide whether the environmental impact of a proposed ac-

tion is significant enough to warrant preparation of an EIS. *See* 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9 (1994).

B. Facts.

On June 26, 1990, in response to litigation brought by a number of environmental groups, *Northern Spotted Owl v. Hodel,* 716 F.Supp. 479 (W.D.Wash.1988), the Secretary listed the Northern Spotted Owl as a threatened species pursuant to the ESA. 55 Fed.Reg. 26,114 (1990). In his final rule, the Secretary explained that he could not designate a critical habitat based only on the available information. Plaintiffs in the litigation sought an order compelling the Secretary to begin the designation process, and the district court ordered the Secretary to publish a proposed critical habitat designation by April 30, 1991. The court also ordered the Secretary to publish a final designation rule "at the earliest possible time permitted under the appropriate regulations." *Northern Spotted Owl v. Lujan,* 758 F.Supp. 621, 630 (W.D.Wash.1991).

On May 6, 1991, the Secretary published an initial proposed regulation designating 11,639,195 acres of federal, state and private lands as "proposed critical habitat." 56 Fed. Reg. 20,816 (1991). The Secretary also announced his intention to revise the designation after receiving comments on the initial proposal. *Id.* After proposing the critical habitat, the Secretary held four public hearings at which 364 people testified on the proposal.

As part of his May 6, 1991 announcement, the Secretary concluded that he did not need to prepare an EA (and therefore an EIS) in conjunction with the designation. 56 Fed.Reg. 20,824 (1991). The Secretary referred to a policy, that he first announced in 1983, that determinations made under § 4 of the ESA were not subject to NEPA. The 1983

policy was based primarily on (1) the Sixth Circuit's holding in *Pacific Legal Foundation v. Andrus,* 657 F.2d 829 (6th Cir.1981), that decisions to list species as threatened or endangered under the ESA were exempt from NEPA, and (2) a letter from the Council on Environmental Quality (CEQ) whose "interpretation of NEPA is entitled to substantial deference," *Andrus v. Sierra Club,* 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979), that urged the Secretary to cease preparing EISs in conjunction with actions under § 4 of the ESA. 48 Fed.Reg. 49,244 (1983). On May 30, 1991 Douglas County submitted formal comments to the Secretary, alleging that the Secretary had failed to comply with NEPA.

The Secretary issued a revised proposed designation of critical habitat on August 13, 1991. 56 Fed.Reg. 40,002 (1991). The revised designation reduced the critical habitat to 8,240,160 acres by eliminating all privately owned land and most state owned land. The Secretary held another sixty day Comment period on the proposed designation and announced another four public hearings. The revised proposal affirmed the Secretary's decision that an EA was not necessary.

On January 15, 1992, the Secretary issued the final designation of critical habitat. 57 Fed.Reg. 1,796 (1992). The final designation includes 6,887,000 acres, all of which is federal land. The final rule includes a lengthy analysis of all the factors that led to the final critical habitat designation.

Douglas County filed this suit in United States District Court for the District of Oregon on September 25, 1991, seeking declaratory and injunctive relief. The County's primary allegation is that the Secretary failed to comply with NEPA in designating a critical habitat. The Secretary challenged Douglas County's standing to bring the action. All

parties filed motions for summary judgment after publication of the final designation.

The district court found that the County had standing to pursue its claims. The court granted summary judgment on behalf of the County, finding that NEPA did apply to the Secretary's decision to designate a critical habitat. *See Douglas County v. Lujan,* 810 F.Supp. 1470, 1484-85 (D. Oregon 1992).[2] The district court entered an order setting aside the final designation of critical habitat until the Secretary complies with NEPA. The court then, sua sponte, stayed the order pending appeal.

III. ANALYSIS

On appeal, the Secretary and Headwaters argue that the district court erred when it ruled in favor of the County. The Secretary asserts that the County does not have standing and, on the merits, argues that NEPA does not apply to designations of critical habitat because the ESA procedures have displaced the NEPA procedures. Headwaters argues that an EIS is not required because the federal action at issue does not change the natural, physical environment, and because requiring an EIS would frustrate the purposes of both NEPA and the ESA. Appellee Douglas County and amici Northwest Forest Resource Council, Douglas Timber Operators, Southern Forest Products Association, Southern Timber Purchasers Council, and American Forest & Paper Association (Timber), respond to these claims.

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[2] The new Secretary of the Interior, Bruce Babbitt, has replaced Manuel Lujan as a defendant in this litigation.

A. Standing.

1. Standard of Review.

We review questions of standing de novo. *See Wedges/Ledges of Cal., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 61 (9th Cir.1994).

2. Analysis.

The Supreme Court articulated the requirements for Article III standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992):

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and (b) "actual or imminent not 'conjectural' or 'hypothetical,'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. 504 U.S. at —, 112 S.Ct. at 2136 (citations omitted).

In addition to these constitutional requirements, a plaintiff challenging a statutory provision under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, must show that the injury he or she has suffered falls within the "zone of interests" that the statute was designed to protect. *See Lujan. v. National Wildlife Federation,* 497 U.S. 871, 883, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990); *Douglas*

County, 810 F.Supp. at 1475. Describing the "zone of interests" under NEPA, we recently stated that:

> NEPA was enacted in order "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321 (1988). The purpose of NEPA is to protect the environment, not . . . economic interests. . . . Therefore, a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA.

Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir.1993) (citations omitted).

To find that the County's interests do not fall inside the "zone of interests" protected by NEPA, we would have to find that (1) the County's interests are inconsistent with the purposes of NEPA, and that (2) the interests are so inconsistent that it would be unreasonable to assume that Congress intended to permit the suit. *See Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1582-83 (9th Cir.1993) (citing *Clarke v. Security Industry Ass'n*, 479 U.S. 388, 107 S.Ct. 750, 93 L.Ed.2d 757 (1987)).

Douglas County asserts that it has standing based on several types of injuries: procedural injury, injury to its proprietary interests, injury to the quality of life of its citizens, injury to wildlife within the county, and injury to its resource management interests. We conclude that the narrow circumstances of this case are sufficient to support procedural standing for Douglas County. This being the case, there is no need for us to address the other alleged bases for standing.

The County asserts that it has standing "based upon its procedural injuries resulting from the FWS's failure to prepare an environmental document that explores a range of alternatives and cumulative effects." Appellee Opening Brief at 15. The Supreme Court recently addressed the issue of procedural standing in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, — n. 7, 8, 112 S.Ct. 2130, 2142 n. 7, 8, 119 L.Ed.2d 351 (1992).[3] The Court suggested that plaintiffs living near a site for a proposed federal dam would have procedural standing to sue if the licensing agency failed to prepare an EIS, even though the EIS may have no impact on the plans for the dam. *See id.* 504 U.S. at — n. 7, 112 S.Ct. at 2142 n. 7. *Lujan* requires a plaintiff to show two essential elements for procedural standing: (1) that he or she is a "person who has been accorded a procedural right to protect [his or her] concrete interests. . . ." *Lujan*, 504 U.S. at n. 7, 112 S.Ct. at 2142 n. 7[4] and (2) that the plaintiff has

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[3] Ninth Circuit cases also have found that procedural injury can form the basis for standing. *See Pacific Northwest Generating Coop. v. Brown*, 25 F.3d 1443, 1450 (9th Cir.1994) (plaintiffs with an economic interest in preserving salmon have procedural interest in ensuring that the ESA is followed); *Friends of the Earth v. United States Navy*, 841 F.2d 927, 931-32 (9th Cir.1988) (residents who live near site of proposed port have procedural standing to sue for Navy's alleged failure to follow permitting regulations); *State of California v. Block*, 690 F.2d 753, 776 (9th Cir.1982) (state of California has procedural standing to challenge the adequacy of an EIS for forest service's land allocation); *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir.1975) (city located near proposed freeway interchange has procedural standing to challenge agency's failure to prepare an EIS).

[4] It is unclear whether this "procedural right" must be conferred by a statute, or whether the right arises because a concrete interest is threatened. In *Lujan*, the Court discusses the "citizensuit" provisions of the

(continued...)

"some threatened concrete interest . . . that is the ultimate basis of [his or her] standing." *Lujan*, 504 U.S. at — n. 8, 112 S.Ct. at 2143 n. 8; *see also Douglas County*, 810 F.Supp. at 1477.[5] In addition, plaintiffs must show that their interest falls within the "zone of interests" that the challenged statute is designed to protect. *See Pacific Northwest*, 25 F.3d at 1450; *Friends of the Earth* 841 F.2d at 932.

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[4] (...continued)
ESA which allow certain persons to sue and thus gives them a procedural right to ensure that statutory procedures are followed correctly. *Lujan*, 504 U.S. at —, 112 S.Ct. at 2142. But in footnote seven, the Court states that people living near a proposed dam have procedural standing to challenge the agency's failure to prepare an EIS. The Court does not mention any statute that gives them their "procedural right." The Court seems to base its conclusion on the fact that people living close to a proposed dam have "concrete interests" that give them the right to insure that agencies follow correct procedures.

In some of our cases we have granted standing based on a "procedural right" conferred by statute. In *Coleman*, 521 F.2d at 672; and in *Block*, 690 F.2d at 776, we conferred standing based on NEPA's provision that certain government entities have a procedural right to participate in the NEPA process. But in *Friends of the Earth*, 841 F.2d at 931-32; in *Pacific Northwest*, 25 F.3d at 1449; and in a different passage in *Coleman*, 521 F.2d at 671, we do not discuss whether the challenged statutes confer a procedural right on the plaintiffs. There, we assumed that plaintiffs with separate "concrete interests" in the environment have a right to see that applicable procedures are properly followed.

Because some of our cases and some language in *Lujan* require that plaintiffs have a right conferred by the challenged statute, we require that showing in this case.

[5] The district court was correct to equate the "geographic nexus" test of past Ninth Circuit cases with the "concrete interest" test of *Lujan*, 504 U.S. at — n. 8, 112 S.Ct. at 2143 n. 8. See *Douglas County*, 810 F.Supp. at 1477.

The County has been "accorded a procedural right" because NEPA provides that "local agencies, which are authorized to develop and enforce environmental standards" may comment on the proposed federal action. 42 U.S.C. § 4332(2)(C). The County is such a local agency because an Oregon Statute authorizes counties to "[p]repare, adopt, amend, and revise" land management plans that contain environmental standards. Or.Rev.Stat. § 197.175 (1993); *see also* Or.Admin.R. 660-06-000.

The County must also show a "concrete interest" that underlies its procedural interest. That interest must be within the zone of interests NEPA was designed to protect. The County's proprietary interest in its lands adjacent to the critical habitat represents this necessary "concrete interest". The affidavit of Kenneth Hendrick, director of the Land Department for Douglas County, expresses concerns with the proposed critical habitat designation. Hendrick alleges that the land management practices on federal land could affect adjacent county-owned land: "By failing to properly manage for insect and disease control and fire, the federal land management practices threaten the productivity and environment of the adjoining [county] lands." E.R. at 33-34.

These statements describe concrete, plausible interests, within NEPA's zone of concern for the environment, which underlie the County's asserted procedural interests. It is logical for the County to assert that its lands could be threatened by how the adjoining federal lands are managed.[6]

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[6] *Lujan*, 504 U.S. — at n. 7, 112 S.Ct. at 2142 n. 7, states that consequences of a challenged action are adequate for standing even when they occur in the far future, but it does not address how high the probability of their occurrence must be. When the dam of *Lujan's* footnote seven is finally built, it likely to cause the environmental harm that the plaintiffs allege. In *Pacific Northwest*, 25 F.3d at 1449,

(continued...)

It is uncertain whether the findings of an EIS would affect the Secretary's critical habitat designation and when the adjacent county lands would actually be harmed. But under *Lujan,* those concerns are not important: "The person who has been accorded a procedural right to protect his concrete interests can assert the right without meeting all the normal standards for repressibility and immediacy." *Lujan,* 504 U.S. at n. 7, 112 S.Ct. at 2142 n. 7.

In short, the County meets all of *Lujan's* strict procedural standing requirements. The County has a procedural right, as well as a concrete interest that could be harmed by the critical habitat designation, and that interest is within the zone of interests protected by NEPA.

B. NEPA claims.

1. Standard of Review.

We review a district court's grant of summary judgment de novo. *See Jesinger v. Nevada Fed. Credit Union,* 24 F.3d 1127, 1130 (9th Cir.1994).

2. Analysis.

Whether NEPA applies to a decision of the Secretary to designate a critical habitat under the ESA is a question of first impression. Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), requires "to the fullest extent possible," that

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[6] (...continued)
however, we suggested that causation need only be established with "reasonable probability." We think that it is "reasonably probable" that the designation of the critical habitat would affect adjoining lands.

"all agencies of the Federal Government" comply with the EIS requirements when they take "major Federal actions significantly affecting the quality of the human environment." Preparation of an EIS ensures both that agencies give proper consideration to the environmental consequences of their actions, *see Merrell,* 807 F.2d at 777-78, and that "relevant information will be made available to the larger audience that they may also play a role in . . . the decisionmaking process. . . ." *Robertson,* 490 U.S. at 349, 109 S.Ct. at 1845.

The Supreme Court has interpreted the language "to the fullest extent possible" to be "neither accidental nor hyperbolic." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n,* 426 U.S. 776, 787, 96 S.Ct. 2430, 2438, 49 L.Ed.2d 205 (1976). Rather, the Court found the language to be a "deliberate command" that the consideration of environmental factors not be "shunted aside" in the "bureaucratic shuffle." *Id.*

Despite the strict language of NEPA, courts have found that some agency actions are not subject to the NEPA requirements. We have noted that "NEPA was not intended to repeal by implication any other statute." *Merrell,* 807 F.2d at 779 (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 694, 93 S.Ct. 2405, 2419, 37 L.Ed.2d 254 (1973)). One exception to NEPA's application derives from a statement made by the NEPA conferees. NEPA applies unless "the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." H.Conf.Rep. No. 765, 91st Cong., 1st Sess. (1969), *reprinted in* 1969 U.S.C.C.A.N. 2767, 2770.

In *Flint Ridge,* 426 U.S. at 788, 96 S.Ct. at 2438, the Supreme Court, relying on the conferees' language, concluded that requiring the Secretary of the Department of Housing and Urban Development to prepare an EIS would create an

or her duties under the Interstate Land Sales Full Disclosure Act. 15 U.S.C. §§ 1701 *et seq.* The Court found that the Secretary could not prepare an EIS and still comply with the statutory duty to allow disclosure statements filed by developers to go into effect within 30 days of filing. *See id.* at 791, 96 S.Ct. at 2439-40.[7]

In contrast, the designation of a critical habitat at issue in the instant case does not occur in a highly restrictive time frame. Thus, time constraints alone would not prevent the Secretary from preparing an EIS. Douglas County argues that without this "irreconcilable" statutory conflict, NEPA must apply. We disagree, and, for the reasons set forth below, we hold that NEPA does not apply to the designation of a critical habitat.

a. ESA Procedures Have Displaced NEPA Requirements.[8]

In *Merrell v. Thomas,* 807 F.2d at 778, we found that NEPA did not apply when the EPA registered pesticides

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[7] Courts have discussed "categorical exceptions" to NEPA that do not apply in the instant case. *See, e.g., Pacific Legal Foundation,* 657 F.2d at 834 n. 4 (actions under the Clean Air Act are categorically exempt from NEPA); *Jones v. Gordon,* 792 F.2d 821, 827 (9th Cir. 1986) (discussing a categorical exemption from NEPA for permits under the Marine Mammal Protection Act).

[8] The County argues that because defendants did not raise the issue of statutory displacement in lower court, they may not do so on appeal. We disagree. Though in the district court, the defendants did not argue that the process of designating a critical habitat replaced NEPA, there is no bar to their raising new *arguments* on appeal if those arguments are purely legal. A court of appeals has the discretion to consider those new theories. *See Telco Leasing, Inc. v. Transwestern Title Co.,* 630 F.2d 691, 693 (9th Cir. 1980).

under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. We traced the legislative history of FIFRA and concluded that because Congress created two different mechanisms in FIFRA and NEPA, and because Congress declined the opportunity to apply NEPA to FIFRA, that it intended that FIFRA procedures replace NEPA for pesticide registration. *See id.* at 778-79. Congress amended FIFRA after the passage of NEPA. Without mentioning NEPA, Congress created a procedure that made the NEPA procedure "superfluous." *Id.* at 778. However, the process under FIFRA was different from the NEPA procedures in several important respects, and the legislation represented a compromise among the various interested parties. *See id.* Congress amended FIFRA again in 1975, 1978, and 1984. Though it had the opportunity on those three occasions to alter legislatively the EPA's earlier interpretation of FIFRA that did not require compliance with NEPA, Congress declined to do so. We thus concluded that Congress did not intend for NEPA to apply to FIFRA.

The legislative history of the ESA at issue in the instant case follows a similar pattern and convinces us that Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements. In 1978, eight years after the effective date of NEPA, Congress enacted a set of amendments to the ESA. The amendments provided a procedure for the designation of a critical habitat and allowed Congress to consider the economic impact of a designation. The language of the House Committee Report indicates that the members contemplated the structure of the entire process

for designating critical habitats.[9] The report indicates that the committee members wished to introduce some "flexibility" into the stringent requirements of the ESA. H.R.Rep. No. 1625, 95th Cong., 2d Sess. 14, *reprinted in* 1978 U.S.C.C.A.N. 9453, 9464. The report states that "the legislation aims to improve the listing process and the public notice process" ensuring that the Secretary only makes a critical habitat designation "after a thorough survey of all the available data" and after notice to the affected communities. *Id.* The report later describes the extensive notice provisions that "will insure that the Department of the Interior is not listing species and designating critical habitat without consulting the views of the people of the affected area." *Id.* at 16.

The procedure Congress chose, as in *Merrell,* makes the NEPA procedure seem "superfluous." Before the Secretary can issue a final critical habitat designation, he or she must now (1) publish a notice and the text of the designation in the Federal Register; (2) give actual notice and a copy of the designation to each state affected by it; (3) give notice to appropriate scientific organizations; (4) publish a summary of the designation in local newspapers of potentially affected areas; and (5) hold a public hearing if one is requested. 16 U.S.C. § 1533(b)(5). This carefully crafted congressional mandate for public participation in the designation process, like the FIFRA procedures reviewed in *Metered,* displaces NEPA's procedural and informational requirements.

The process requires that the Secretary examine the effects of his or her actions by taking into account economic and other relevant impacts. Through that analysis and by examining "the best scientific data available," 16 U.S.C. §

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[9] The language in the 1978 House Bill regarding designation of critical habitat eventually became the law in ESA § 4(b), 16 U.S.C. § 1533(b).

1533(b)(2), the Secretary will consider impacts that concern NEPA, to the extent that the critical habitat designation has a positive environmental effect on the species in question. The critical designation process also provides for public notice, another goal of NEPA. *See Robertson,* 490 U.S. at 349, 109 S.Ct. at 1845.

As in *Merrell,* however, the procedure in the statute at issue represents a "compromise between disparate points of view," H.R.Rep. No. 1625 at 13-14, 1978 U.S.C.C.A.N. 9463, 9464, which leaves little room for the imposition of the NEPA requirements. In *Merrell*, we concluded that applying NEPA to FIFRA's registration process would "sabotage the delicate machinery that Congress designed to register new pesticides." *Merrell*, 807 F.2d at 779. The same is true here. Congress through debate and compromise forged a specific process for the Secretary to follow when addressing the needs of endangered species. Requiring the EPA to file an EIS "would only hinder its efforts at attaining the goal of improving the environment." *Pacific Legal Foundation,* 657 F.2d at 837.

In addition, the ESA has an important mandate that distinguishes it from NEPA. Congress gave a special guideline to the Secretary in the critical habitat process. Though the Secretary may exclude from the critical habitat any area, the exclusion of which, would be more beneficial than harmful, he or she must designate any area without which the species would become extinct. 16 U.S.C. § 1533(b)(2). This mandate conflicts with the requirements of NEPA because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions.

Congress also made an implicit choice to accept the Secretary's policy not to prepare EISs when designating critical habitats. This choice is added evidence that Congress

did not intend NEPA to apply to critical habitat designations. In 1988, Congress amended the ESA again. Though it addressed other parts of § 1533 (§ 4 of the ESA), Congress did not change the critical habitat provisions. This inaction is significant because before the 1988 amendments, in 1981, the Sixth Circuit in *Pacific Legal Foundation*, 657 F.2d at 835, held that NEPA did not apply when the Secretary listed a species as threatened or endangered under the ESA and suggested in dicta that the process of designating a critical habitat might provide the "functional equivalent" of an EIS.[10]

More importantly, in 1983, the Secretary announced in the Federal Register his decision not to prepare EAs (and, therefore, EISs) before making critical habitat designations. 48 Fed.Reg. 49,244 (1983). In the 1988 amendments, Congress did not respond to this interpretation of § 1533. "[W]hen Congress revisits a statute giving rise to a long-standing administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the

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[10] Courts have used a "functional equivalent" test to exempt agency action from NEPA requirements. In *Pacific Legal Foundation,* 657 F.2d at 835, the Sixth Circuit suggested that the "ESA may now provide the functional equivalent of an impact statement when a critical habitat is designated." Other courts have used the same analysis. *See Environmental Defense Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C.Cir.1973) (finding FIFRA Procedures to be the functional equivalent of NEPA); *Getty Oil Co. v. Ruckelshaus,* 467 F.2d 349, 359 (3rd Cir.1972) (Clean Air Act procedure should be used instead of NEPA), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 937, 35 L.Ed.2d 256 (1973). The defendants here do not advance the functional equivalent argument, so we do not address it. The County would have us believe that the "displacement" argument defendants make is the same as the "functional equivalent" test. We do not agree. The "displacement" argument asserts that Congress intended to displace one procedure with another. The "functional equivalent" argument is that one process requires the same steps as another.

agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 846, 106 S.Ct. 3245, 3254, 92 L.Ed.2d 675 (1986) (quoting *NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-75, 94 S.Ct. 1757, 1761-62, 40 L.Ed.2d 134 (1974)); *see also Merrell,* 807 F.2d at 779.

Douglas County argues that the legislative history of the ESA is not comparable to that of FIFRA. The County relies primarily on a statement in the Conference Committee Report for the 1978 ESA amendments which requires that actual notice of the critical habitat designation and "any environmental assessment or environmental impact statement" be supplied to affected local governments. H.Conf.Rep. No. 1804, 95th Cong., 2d Sess., 27 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484, 9494. The statement is far from a clear, considered indication of congressional intent. The comment does not direct the Secretary to prepare an EA or an EIS, it just states that if one is available, it should be forwarded. In light of the fact that this language did not become part of the final statute, and in light of the rest of the legislative history, we think this phrase does not indicate that Congress intended NEPA to apply to ESA critical habitat designations.

The district court, finding that Congress intended NEPA to apply to critical habitat designations, made much of the debate on the Senate floor over the 1978 amendments. *See Douglas County*, 810 F.Supp. at 1483. If that debate demonstrates anything to us, it demonstrates that though the Senate considered amending the ESA to state clearly that NEPA applied to ESA critical habitat designations, Congress chose not to make that statement.

The County argues that *Jones v. Gordon*, 792 F.2d 821 (9th Cir.1986) should control our analysis regarding NEPA's

applicability. *Jones*, involved Sea World's application for a permit under the Marine Mammal Protection Act to take ten killer whales from the wild. *Jones* carries the torch of *Flint Ridge*, 426 U.S. at 788, 96 S.Ct. at 2438, finding no "irreconcilable conflict" between NEPA and the Marine Mammal Protection Act. *Jones*, 792 F.2d at 825. But in *Jones* we do not state that the finding of an irreconcilable statutory conflict is the only way to avoid the NEPA provisions, and it is unclear from the opinion whether the plaintiffs advanced other theories. Moreover, this court, in *Merrell*, joined the Sixth Circuit in *Pacific Legal Foundation*, 657 F.2d at 835, in finding that the "irreconcilable conflict" test did not afford the only exception to the application of NEPA to federal actions. Therefore, we find that *Jones* does not control.

As for the concern that if the Secretary is not subject to the NEPA requirements, he or she will have unchecked discretion in making critical habitat designations, we believe that the procedural requirements of the ESA, combined with review of decisions possible under the Administrative Procedure Act, are adequate safeguards.[11]

b. NEPA does not Require an EIS for Actions that Preserve the Physical Environment.

Even if the legislative history suggesting that Congress intended that the ESA procedure for designating a critical habitat displace the NEPA requirements were not as clear, the Secretary would still not be obliged to prepare an EIS when he or she designated a critical habitat under the ESA. We find that the NEPA procedures do not apply to federal

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[11] Plaintiffs can challenge the Secretary's compliance with the ESA's procedural requirements under the APA, 5 U.S.C. §§ 551, *et seq.*

actions that do nothing to alter the natural physical environment.

When we consider the purpose of NEPA in light of Supreme Court guidance on the scope of the statute, we conclude that an EA or an EIS is not necessary for federal actions that conserve the environment.[12] The purpose of NEPA is to "provide a mechanism to enhance or improve the environment and prevent further irreparable damage." *Pacific Legal Foundation*, 657 F.2d at 837. To this end, NEPA mandates an EIS report describing the "environmental impact" of significant federal actions, 42 U.S.C. § 4332(2)(C).

The Supreme Court discussed the NEPA requirements in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73, 103 S.Ct. 1556, 1560-61, 75 L.Ed.2d 534 (1983). The Court emphasized that the adjective "environmental" implies that "NEPA does not require the agency to assess *every* impact or effect of its proposed action, but only the impact or effect on the environment." *Id.* at 772, 103 S.Ct. at 1560 (emphasis in original). The Court added that Congress meant the *physical* environment—the air, land, and water. The Court concluded that "although NEPA states its goals in sweeping terms of human health and welfare, these goals are *ends* that Congress has chosen to pursue by *means* of protecting the physical environment." *Id.* at 773, 103 S.Ct. at 1561 (emphasis in original) (footnote omitted).

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[12] Amici Timber argue that if an EIS is not required for a designation of critical habitat, that the Secretary must prepare an EA, the document that explores whether an EIS is necessary. This line of reasoning is specious. If it is clear that an EIS is never necessary when the Secretary designates a critical habitat under the ESA, then an EA would not serve any purpose.

If the purpose of NEPA is to protect the *physical* environment, and the purpose of preparing an EIS is to alert agencies and the public to potential adverse consequences to the land, sea or air, then an EIS is unnecessary when the action at issue does not alter the natural, untouched physical environment at all.

Other courts have reached the same conclusion. In *Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669 (5th Cir.1992), *cert. denied sub nom, Texas Water Conservation Ass'n v. Dept. of the Interior*, — U.S. —, 113 S.Ct. 75, 121 L.Ed.2d 40 (1992), the Fifth Circuit found that no EIS was necessary when the federal government acquired a negative easement that prohibited the commercial development of certain wetlands in Texas. The court found that the Secretary did not need to prepare an EIS even though the easement would forever prevent the plaintiffs from constructing a reservoir: "The acquisition of a negative easement which prohibits development does not result in the requisite 'change' to the physical environment." *Id.* at 680. As another court put it, an EIS is not required "in order to leave nature alone." *National Ass'n of Property Owners v. U.S.*, 499 F.Supp. 1223, 1265 (D.Minn.1980), *aff'd, State of Minnesota v. Block,* 660 F.2d 1240 (8th Cir.1981).

The district court ruled against the defendants on this issue, but its treatment of the argument is unpersuasive. The district court found that the argument—that EISs are not required for federal actions that maintain the environmental status quo—could not be determinative, no matter its merits, because it assumed a fact not in evidence. That fact was, that the environment would remain unchanged if designated a critical habitat. The court offered as an example the possibility that the area could acquire more old growth characteristics if it were left alone.

The district court missed the point. Of course a forest, free of human interference, changes all the time—saplings grow, mature trees die, dead trees decay. The touchstone is not *any* change in the status quo, but change effected by humans. Headwaters argues, and we agree, that when a federal agency takes an action that prevents human interference with the environment, it need not prepare an EIS. The environment, of its own accord, will shift, change, and evolve as it does naturally.[13]

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[13] Amici Timber argue that NEPA requires an EIS even for actions that maintain the status quo. Though the cases amici Timber cite do involve actions that at least in part, preserve the environment, they are inapposite. The parties in those cases only challenged whether the agency adhered properly to the NEPA procedures. They did not challenge the applicability of NEPA to the contested actions. They apparently assumed that NEPA was applicable. *See Hovsons, Inc. v. Secretary of the Interior*, 711 F.2d 1208 (3rd Cir.1983) (management plan for national reserve); *County of Josephine v. Watt*, 539 F.Supp. 696 (N.D.Cal.1982) (designation of a river under the Wild and Scenic Rivers Act); *Hogan v. Brown*, 507 F.Supp. 191 (W.D.Ark.1980) (acquisition of land for wildlife refuge), *aff'd*, 665 F.2d 849 (8th Cir.1981). We cannot interpret a court's discussion of an EIS as an endorsement of the necessity for an EIS in cases where its necessity was not questioned.

Amici Timber also cite *Confederated Tribes and Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466, 476 (9th Cir.1984), *cert. denied*, 471 U.S. 1116, 105 S.Ct. 2358, 86 L.Ed.2d 259 (1985), for the proposition that the relicensing of a hydroelectric plant requires an EIS even though it maintains the status quo. The case is inapposite because there was a serious question about the impact on fish populations from the continued operation of the hydropower project. This kind of environmental damage is exactly what the spotted owl critical habitat designation does not threaten. In addition, we recently decided that actions that do not change the status quo do not require an EIS. *See National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343-44 (9th Cir.1995).

c. ESA Furthers Goals of NEPA Without Requiring an EIS.

We also find that NEPA does not apply to the designation of a critical habitat because the ESA furthers the goals of NEPA without demanding an EIS. NEPA was designed to "promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment," *Metropolitan Edison,* 460 U.S. at 772, 103 S.Ct. at 1560, and "to provide a mechanism to enhance or improve the environment and prevent further irreparable damage." *Pacific Legal Foundation*, 657 F.2d at 837. The ESA is a substantive statute whose goal is to prevent extinction: "[t]he plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978). By designating critical habitats for endangered or threatened species, the Secretary "is working to preserve the environment and prevent the irretrievable loss of a natural resource." *Pacific Legal Foundation*, 657 F.2d at 837. Thus the action of the Secretary in designating a critical habitat furthers the purpose of NEPA. Requiring the EPA to file an EIS "would only hinder its efforts at attaining the goal of improving the environment." *Id.*

The district court found that this rationale, which the Sixth Circuit applied in *Pacific Legal Foundation,* 657 F.2d at 835-40, does not hold in the instant case. In *Pacific Legal Foundation,* the Sixth Circuit gave four reasons why NEPA should not be applied to the Secretary's decision to list species as endangered or threatened under the ESA. We think the analysis applies directly to the facts of the case before us.

First, the court in *Pacific Legal Foundation,* 657 F.2d at 835-36, found that if NEPA is applied to the listing of a species the ESA's purpose would be frustrated because the ESA prevents the Secretary from considering environmental impact when listing a species as endangered or threatened. In critical habitat designations the Secretary can only consider "economic impact and any other relevant impact of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The district court decided that the ESA would not be frustrated by the imposition of NEPA because the language—"any other relevant impact"—could allow the "wide range of impacts required to be analyzed in preparing NEPA documentation." *Douglas County,* 810 F.Supp. at 1479.

The district court did not explain how it decided that the words of the statute were to be given such a broad meaning, and we think its interpretation is misguided. The other impacts that the Secretary may consider must be "relevant" to the designation process. The purpose of the ESA is to prevent extinction of species; and Congress has allowed the Secretary to consider economic consequences of actions that further that purpose. But Congress has not given the Secretary the discretion to consider environmental factors, other than those related directly to the preservation of the species. The Secretary cannot engage in the very broad analysis NEPA requires when designating a critical habitat under the ESA.

The second conclusion of the Sixth Circuit in *Pacific Legal Foundation,* 657 F.2d at 836, is that it would not further the purposes of NEPA to apply NEPA to the ESA because the Secretary does not have discretion to consider factors other than those listed in the ESA when listing a species. As with the first argument, the district court found in the instant case that because the Secretary can consider

"any other relevant impact" when designating a critical habitat, that he or she has the authority to consider the impact on the environment. As we explained above, we do not agree with this broad interpretation.

The third basis for the court's decision in *Pacific Legal Foundation* was that "the Secretary's action in listing a species as endangered or threatened furthers the purpose of NEPA even though no impact statement is filed." *Pacific Legal Foundation,* 657 F.2d at 837. We agree. As with the decision to list a species under the ESA, the decision to preserve critical habitat for a species protects the environment from exactly the kind of human impacts that NEPA is designed to foreclose.

The district court found otherwise, stating that in the Ninth Circuit "NEPA applies to every major federal action absent a clear and unavoidable statutory conflict." *Douglas County,* 810 F.Supp. at 1482. We do not think this is an accurate description of Ninth Circuit law. In *Merrell*, 807 F.2d at 778, for instance, we found that NEPA did not apply to FIFRA, not because there was an unavoidable conflict between the statutes, but because the legislative history showed that Congress did not intend for NEPA to apply.

Fourth, the court in *Pacific Legal Foundation*, 657 F.2d at 840, found that the legislative histories of NEPA and the ESA indicate that Congress did not intend that the Secretary prepare an EIS before listing a species as endangered or threatened under the ESA. As we discuss in part III.B.2.a., *supra*, the legislative histories of NEPA and the ESA likewise indicate that Congress did not intend that the Secretary file an EIS before designating a critical habitat. In sum, we find that the analysis in *Pacific Legal Foundation* applies to the instant case, and that to apply NEPA to the ESA would further the purposes of neither.

IV. CONCLUSION

We find that Douglas County does have standing to challenge the Secretary's decision not to prepare an EIS before designating the Northern Spotted Owl critical habitat, based on its procedural injury. On the merits, we find that NEPA does not apply to the Secretary's decision to designate a habitat for an endangered or threatened species under the ESA because (1) Congress intended that the ESA critical habitat procedures displace the NEPA requirements, (2) NEPA does not apply to actions that do not change the physical environment, and (3) to apply NEPA to the ESA would further the purposes of neither statute.

This conclusion is as consistent with legal precedent as it is with sound policy. The old growth forests and the species that inhabit them are unique resources that deserve protection. We are reluctant, as was the Sixth Circuit in *Pacific Legal Foundation*, 657 F.2d at 838, to make NEPA more of an "obstructionist tactic" to prevent environmental protection than it may already have become. Affirmed in part, reversed in part, and remanded for consideration consistent with views here and above expressed.

Each side to bear their own costs of suit.

APPENDIX B

DOUGLAS COUNTY, PLAINTIFF,

v.

MANUEL LUJAN, DEFENDANT.

Civ. No. 91-6423-HO.

United States District Court,

D. Oregon.

Dec. 22, 1992.

ORDER

HOGAN, District Judge:

Plaintiff Douglas County filed this action for declaratory judgment and injunctive relief challenging defendant's failure to prepare an environmental impact statement (EIS) relative to designating critical habitat for the Northern Spotted Owl. Plaintiff and defendant have filed cross motions for summary judgment (# 15, # 60). Intervenor plaintiffs Coos County and Josephine County also seek summary judgment (# 36, # 41).[1]

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[1] Even though there are intervenor plaintiffs, this order refers to plaintiff in the singular.

FACTS

On June 26, 1990, the United States Fish and Wildlife Service (FWS) listed the Northern Spotted Owl as a threatened species pursuant to the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq.* *See* 55 Fed.Reg. 26,114 (June 26, 1990). ESA requires "to the maximum extent prudent and determinable," critical habitat to be designated concurrently with the listing of a species. 16 U.S.C. § 1533(a)(3)(A). In its final rule listing the Northern Spotted Owl as threatened, FWS found that critical habitat was not determinable at that time. The failure to designate critical habitat was challenged in federal court and FWS was ordered to publish a proposed critical habitat designation by April 30, 1991, and to publish a final designation rule "at the earliest possible time permitted under the appropriate regulations." *Northern Spotted Owl v. Lujan*, 758 F.Supp. 621, 629-630 (W.D.Wash.1991).

On May 6, 1991, FWS published a proposed rule designating approximately 11,602 acres of public and private land within Oregon, Washington, and California as critical habitat. 56 Fed.Reg. 20,816 (May 6, 1991), Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 3. Part of the proposed rule stated: "The Service has determined that an Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act." 56 Fed.Reg., *supra* at 20,824. The Secretary is required to designate habitat "on the basis of the best scientific data available" and to take "into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). In arriving at the May 6, 1991 proposed designation, FWS

relied in part on a preliminary economic analysis it previously prepared. Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 2. FWS acknowledged that it would need to conduct further study and consider additional data, including public comments, prior to publishing the final designation. 56 Fed.Reg., *supra* at 20,821.

On May 15, 1991, Douglas County filed a "Notice of Intent to File Citizens Suit Under Sec 11(g) of the Endangered Species Act for Failure to Abide by the National Environmental Protection Act." *See* Memorandum in Support of Motion for Summary Judgment (# 19), Exhibit A.

As part of the rule-making process, FWS requested comments from the general public relative to the critical habitat proposal. On May 30, 1991, plaintiff submitted formal comments to the Secretary, stating that the Secretary had failed to comply with NEPA requirements by not exploring a range of alternatives to the proposed action.

Plaintiff requested the assistance of United States Senator Robert Packwood to determine the status of plaintiff's notice of intent to file citizen suit. On August 5, 1991, FWS sent Senator Packwood a letter stating "(t)he Service believes that, under the reasoning of [the *Pacific Legal Foundation v. Andrus*] decision, preparing an EIS on the proposed critical habitat designation would not further the goals of NEPA or the Act." Memorandum in Support of Motion for Summary Judgment (# 19), Exhibit B.

After the comment period closed on the proposed designation, FWS prepared a second economic analysis report which reviewed a range of economic impacts including an analysis of employment and revenue loss in the timber industry in each county in the affected states. Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 5, pp. 19-25, and Tables 9-11.

On the basis of the second report, comments received on the first proposed designation and other data and analysis, FWS published a revised proposed rule in which 8,240,160 acres were proposed as critical habitat. 56 Fed.Reg. 40002, (August 13, 1991), Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 6. In the revised proposed designation, FWS excluded all private, tribal, and some state lands and revised some of the critical habitat units. In the second proposed rule, FWS affirmed its determination that an Environmental Assessment (EA) was not required.

The primary reason FWS published two proposed designations was to allow additional review and consideration of the economic impact of critical habitat designation and to permit full opportunity for public comment. 56 Fed.Reg. 20,822. Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 3.

FWS held another 60 day comment period following the publication of the revised proposed designation and continued to conduct further analysis of economic impact of the designation. FWS published a final "Economic Analysis of Critical Habitat Designation Effects for the Northern Spotted Owl" in January, 1992. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 7.

On January 15, 1992, FWS published its final rule designating Northern Spotted Owl critical habitat. 57 Fed.Reg. 1796 (Jan. 15, 1992). Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 8. The final designation includes approximately 6.9 million acres. All state, private, tribal, and other non-federal lands are excluded. As with the previous proposed rules, the final rule stated that FWS had determined that it was not required to prepare an EA in conjunction with the designation. "A

notice outlining the Service's reasons for this determination was published in the Federal Register on October 25, 1983 (48 FR 49244)." *Id.*, 57 Fed.Reg. 1833.

FWS premised its conclusion that an EA was not necessary in conjunction with the designation primarily on the reasoning in a Sixth Circuit opinion and a letter received from the Council on Environmental Quality (CEQ). The Sixth Circuit opinion holds that, as a matter of law, FWS is exempt from the NEPA requirement to prepare an EIS prior to listing decisions under ESA. *Pacific Legal Foundation v. Andrus,* 657 F.2d 829 (6th Cir.1981).

The letter from CEQ, "whose interpretation of NEPA is entitled to substantial deference," *Andrus v. Sierra Club,* 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979), urged FWS to cease preparing EAs prior to making ESA listing decisions. *See* Memorandum in Support of Motion for Summary Judgment (# 19), Exhibit C.

On September 25, 1991, Douglas County filed this action alleging four claims. Plaintiff's first claim alleges that FWS violated NEPA by failing to develop a range of alternatives to the final Northern Spotted Owl critical habitat designation; plaintiff's second claim alleges that FWS violated NEPA by failing to identify and disclose the cumulative impact of the final Northern Spotted Owl critical habitat designation in conjunction with other connected actions; plaintiff's third claim alleges FWS violated NEPA and ESA by failing to consider other relevant impacts of designating critical habitat; and, plaintiff's fourth claim alleges FWS violated NEPA and ESA by failing to consider the social and economic impacts of designating a particular area as critical habitat. Complaint (# 1), pp. 6-9.

Plaintiff seeks a declaratory judgment that defendant violated NEPA and ESA and an injunction prohibiting defendant from taking any action to designate critical habitat

for the Northern Spotted Owl until an EIS or EA is prepared. *Id.*, p. 9.

ESA CLAIMS

Plaintiff's third and fourth claims for relief are based on alleged violations of both NEPA and ESA. The NEPA portion of those claims is based on FWS's alleged failure to consider various impacts of the Northern Spotted Owl critical habitat designation and is logically subsumed within plaintiff's second (NEPA) claim. Therefore, I will address plaintiff's third and fourth claims under ESA separately and address the NEPA portion of those claims, to the extent necessary, below.

Endangered Species Act Claims:

Defendant moves the court for summary judgment on plaintiff's third and fourth claims under ESA. *See* Defendant's Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), pp. 30-34. Plaintiff responded that it had standing to assert ESA claims but did not respond to defendant's arguments on the merits. *See* Plaintiffs' Brief in Opposition (# 68), pp. 13-14. Plaintiff's memorandum in support of the motion for summary judgment (# 19) only discusses the claims under NEPA.

If a moving party satisfies the initial burden of demonstrating the absence of a material and triable issue of fact, the burden shifts to the opposing party, who must present probative evidence tending to support its claim or defense. *Intel Corp. v. Hartford Acc. and Indem. Co.*, 952 F.2d 1551 (9th Cir.1991). In this case, plaintiff has not controverted the facts asserted by defendant regarding plaintiff's ESA claims.

Plaintiff's third claim for relief asserts that FWS "fail[ed] to consider impacts of designating critical habitat upon wildlife species which utilize forest habitat other than the northern spotted owl (i.e., deer, elk)." Complaint (# 1), p. 8. However, the record reflects that FWS did consider whether the proposed designation of critical habitat would impact other species such as deer and elk and stated a rational basis for its conclusion that the critical habitat designation would not negatively impact those species. *See* 56 Fed.Reg., *supra* at p. 40,028 [service response to Issue 38].

Plaintiff's fourth claim alleges that FWS did not consider "the social and economic impacts of designating Douglas County as critical habitat . . . prior to proposing the specific areas within the county as critical habitat." Complaint (# 1), p. 9.

The record reflects that FWS prepared an analysis of the economic impacts of designation for publication in conjunction with the proposed rule prior to each proposed designation. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibits 2 and 5. The second proposed designation was published for the purpose of considering economic impacts in greater detail than was accomplished with the original revised proposal. 56 Fed.Reg., *supra* at 20,822. The second report examined economic impacts on a county by county basis in each of the affected states. *See* Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 5, Tables 9-11. FWS reviewed county level employment impacts and revenue sharing impacts with calculations of the employment and revenue losses. FWS also developed and implemented a four step process to examine whether any critical habitat area should be excluded because the benefits of exclusion outweighed the benefits of inclusion. Memorandum in

Support of Defendant's Motion for Summary Judgment (# 62), Exhibit 4, p. 1.

With regard to each impacted county, FWS considered the economic impacts, anticipated future harvest, owl factors, and other benefits and proposed a decision on exclusion. *See e.g., Id.,* at B-9—B-11 (considering each factor with respect to Douglas County).

In summary, the administrative record in this case reveals that FWS adequately considered relevant economic issues associated with critical habitat designation and particularly those of employment and revenue loss due to decreased federal timber sales. Plaintiff was afforded an opportunity to respond to both FWS's economic analysis and FWS's balancing process.

Based on the foregoing, I find that FWS took a "hard look" at the impacts in question. *Steppe v. Sierra Club,* 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976), and conducted a "reasonably thorough discussion" of the effects at issue. *Trout Unlimited v. Morton,* 509 F.2d 1276, 1283 (9th Cir.1974). *See also, Marble Mountain Audubon Soc. v. Rice,* 914 F.2d 179 (9th Cir.1990).

Defendant's motion for summary judgment on plaintiff's third and fourth claims for relief under ESA is allowed.[2]

NEPA CLAIMS

Standing:

Article III of the United States Constitution limits the jurisdiction of federal courts to actions involving an actual

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[2] Because I find that defendant is entitled to prevail on the merits of these claims, it is not necessary to address defendant's argument that plaintiff lacks standing to pursue its third claim for relief under ESA.

"case" or "controversy," a limitation that manifests itself, in part, through the doctrine of standing. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 954, 104 S.Ct. 2839, 2845, 81 L.Ed.2d 786 (1984); *Ripplinger v. Collins,* 868 F.2d 1043, 1047 (9th Cir.1989).

To invoke the jurisdiction of the court so as to satisfy the standing requirements of Article III, plaintiff must demonstrate that it has (1) sustained a personal injury, (2) that is fairly traceable to defendant's allegedly unlawful conduct, and (3) that its requested relief is likely to redress the alleged injury. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984); *Ripplinger v. Collins, supra* at 1047.

The standing requirements plaintiff must satisfy to obtain the judicial review it seeks in this action do not end with those imposed by Article III. Plaintiff must also demonstrate that its claims are within the zone of interest sought to be protected by the statute which forms the basis of its claims. This requirement is imposed with regard to plaintiff's NEPA claims, because plaintiff seeks judicial review of those claims under the Administrative Procedure Act (APA), 5 U.S.C. § 702. Plaintiff must rely on section 702, because NEPA does not contain a provision granting rights to judicial review of agency decisions allegedly reached in violation of its procedural requirements.

Section 702 requires plaintiffs seeking judicial review of agency actions to demonstrate that they have suffered legal wrong or have been adversely affected or aggrieved "within the meaning of the relevant statute." 5 U.S.C. § 702.

Therefore, standing requirements as applied to NEPA cases include an injury which is arguably within the zone of interest to be protected or regulated by the statute that plaintiff claims the agency violated. *Lujan v. National Wildlife Federation,* 497 U.S. 871, 110 S.Ct. 3177, 111

L.Ed.2d 695 (1990); *Port of Astoria v. Hodel,* 595 F.2d 467 (9th Cir.1979).

Defendant contends that plaintiff does not have standing to assert NEPA claims in this case, because it "avers no specific and concrete injury cognizable under NEPA." Reply Memorandum in Support of Defendant's Motion for Summary Judgment (# 72), p. 3. Plaintiff argues that it will suffer injury to a variety of proprietary, environmental, economic, and procedural interests as a result of defendant's failure to comply with NEPA.

Defendant contends, however, that "Plaintiff has stated no injury that is not *economic* when closely examined," and that injury to economic interests are not within the zone of interest of NEPA. *Id.*

I find that plaintiff's claims are within the zone of environmental and procedural interests protected by NEPA and, therefore, that plaintiff has the requisite standing to bring this action.

I am not persuaded by defendant's argument that all of plaintiff's alleged injuries are in essence injuries to economic interests. Plaintiff has an environmental interest in managing the fish and wildlife within its boundaries. The affidavit of Troy Reinhart, submitted in support of plaintiff's motion for summary judgment (# 15), indicates a potential environmental injury to species on the Umpqua National Forest with habitat needs different from those of the Northern Spotted Owl.

In addition, I find that NEPA's concern with the "quality of the human environment," 42 U.S.C. § 4332(2)(C), is not as restrictive as urged by defendant. As noted in *Trinity Episcopal School Corp. v. Romney,* 523 F.2d 88, 93 (2nd Cir.1975): "The National Environmental Policy Act contains no exhaustive list of so-called environmental considerations but without question its aims expend beyond water and air

pollution (citation omitted). The Act must be construed to include protection of the quality of life of city residents. Noise, traffic, overburdened mass transportation systems, crime, congestion and even the availability of drugs all affect the urban 'environment' . . ."

In *County of Josephine v. Watt,* 539 F.Supp. 696, 704 (N.D.Calif.1982), county and lumber companies who sought to protect their individual financial interests, but also the quality of life and public interest of their geographic region were afforded standing under NEPA.

In this case, plaintiff has presented evidence which establishes that defendant's designation of critical habitat will profoundly affect the quality of life in Douglas County, and thus has established an environmental injury sufficient to establish standing under NEPA.

In addition, plaintiff has standing based upon injury to procedural interests under NEPA. The failure to follow procedures designed to ensure that the environmental consequences of a proposed action are adequately evaluated is sufficient to support standing for purposes of challenging an agency's failure to prepare an environmental impact statement. This procedural injury alone is sufficient for standing, if the injury is alleged by a plaintiff "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences the project may have." *Friends of the Earth v. U.S. Navy,* 841 F.2d 927, 932 (9th Cir.1988); *City of Davis v. Coleman,* 521 F.2d 661, 671 (9th Cir.1975).

There is no question that Douglas County is within the affected geographic area and can be expected to incur environmental consequences of the designation of critical habitat for the Northern Spotted Owl.

As noted in *Oregon Environmental Council v. Kunzman,* 817 F.2d 484, 491 (9th Cir.1987), "(p)rocedural failures in

EIS preparation create a risk that environmental impacts will be overlooked and provide sufficient 'injury in facts to support standing." *See also Trustees for Alaska v. Hodel,* 806 F.2d 1378, 1380 (9th Cir.1986).

Lujan v. National Wildlife Federation, supra, appears to establish a more restrictive standard which requires a plaintiff to not only demonstrate an "adverse effect" or "aggrievement," but also that the interests were actually affected within the meaning of the relevant statute. However, the "actually affected" test is really nothing more than a restatement of the "geographical nexus" test discussed in *City of Davis v. Coleman, supra.* This conclusion is supported by the recent Supreme Court decision in *Manuel Lujan, Jr. v. Defenders of Wildlife,* — U.S. —, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), where the court noted that ". . . one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an Environmental Impact Statement, even though the dam will not be completed for many years." *Lujan v. Defenders of Wildlife, supra* at —, 112 S.Ct. at 2142, n. 7.

Therefore, although procedural injury alone is not sufficient to establish standing, standing for procedural injury does exist where the procedures in question are designed to protect some threatened, concrete interest that is the ultimate basis for standing. *Id,* n. 8.

Douglas County is within the area where the effects of the critical habitat designation will occur. The potential environmental and quality of life impacts resulting from the procedural injury in this case are the type of injuries NEPA seeks to prevent. Therefore, plaintiff's alleged procedural injuries are sufficient to establish plaintiff's standing to assert NEPA claims.

Discussion:

The National Environmental Policy Act of 1969 (NEPA) requires "to the fullest extent possible," that "all agencies of the Federal Government" shall:

> (c) include in every recommendation or report on proposals for legislation and other Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> (i) the environmental effects of the proposed action,
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented
> (iii) alternatives to the proposed action,
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
> 42 U.S.C. § 4332(C).

NEPA requirements do not mandate particular results or impose substantive obligations upon the agencies, but they do mandate a necessary process. *Robertson v. Methow Valley Citizen's Council,* 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).

If an agency is unsure whether a proposed action requires an EIS, federal regulations (40 CFR 1508.9) direct the agency to prepare an environmental assessment (EA) to determine whether an EIS must be prepared. *ONRC v. Lyng,* 882 F.2d 1417, 1421-22 (9th Cir.1989). The EA must be sufficiently documented to satisfy the reviewing court that the decision not to prepare an EIS was not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with

law. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

Plaintiff contends that the Secretary's designation of critical habitat in this case is a major federal action to which NEPA procedural requirements apply.

Defendant contends that NEPA does not apply to the designation of critical habitat under ESA. The "respective statutes' language and legislative histories indicate, Congress never intended that the purely procedural obligations of NEPA be superimposed on the procedure the Secretary already is obliged to follow in making critical habitat designations." Memorandum in Support of Defendant's Motion for Summary Judgment (# 62), p. 34.

The proposed agency action in this case affects approximately 6.9 million acres. The magnitude of that action in terms of number of acres alone leads to the conclusion that the rule constitutes a major federal action. The record reflects that the designation will impact the economy, employment, public health, and social services in the affected geographic area. Therefore, the action clearly affects the "quality of the human environment."

The issue then becomes whether there is an express or implied exemption from NEPA requirements for the designation of critical habitat under ESA.

Prior to September, 1983, FWS routinely prepared environmental assessments for all regulations under which a species was listed or critical habitat was designated. On October 25, 1983, FWS issued a notice that it had determined that environmental assessments as defined by NEPA need not be prepared in connection' with regulations adopted pursuant to Section 4(a) of ESA. 48 Fed.Reg. 49244 (Oct. 25, 1983). This procedural change was based on recommendations from the Council on Environmental Quality (CEQ) that Section 4 listing decisions are exempt from

NEPA review as a matter of law. *Id.* The CEQ recommendation was based primarily on *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir.1981). *See* Memorandum in Support of Motion (# 19), Exhibit C. The letter also suggested that a listing action "could be classified as a categorical exclusion." *Id.*[3]

However, defendant contends:

> FWS has not relied on a categorical exclusion in determining not to prepare an EIS. As stated in the 1983 "Rule-related notice," the decision to cease preparation of NEPA documentation for Section 4(a) regulations (listing and critical habitat regulations) was based primarily on the Court's reasoning in *Pacific Legal Foundation* . . . (where the court found) . . . not that there was a categorical exclusion, but that FWS was exempt from NEPA.
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> Defendant's Reply Memorandum (# 72), p. 11.

The crux of defendant's argument is that it is exempt from NEPA when designating critical habitat "for the same reasons the Court in *Pacific Legal Foundation* held it was exempt from NEPA when it conducted a listing determination." Reply Memorandum (# 72), p. 12. Therefore, the issue to be decided here is whether the court's reasoning in *Pacific Legal Foundation v. Andrus* regarding listing decisions can be extended and applied to decisions to designate critical habitat.

In *Pacific Legal Foundation v. Andrus*, the Sixth Circuit held that the Secretary is legally exempt from NEPA in performing the ESA obligation to list endangered and threatened species pursuant to Section 4(a) of ESA. The court's holding rests on four grounds. (1) To require the

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[3] For definition of Categorical exclusion," *see* 40 CFR 1508.4.

Secretary to comply with NEPA process when making a listing decision under ESA, "does not and cannot serve the purpose of the Endangered Species Act." *Pacific Legal Foundation v. Andrus, supra* at 835. (2) To require the Secretary to prepare an EIS when making listing decisions under ESA, "would not serve the purpose for filing such a statement." *Id.* at 836. (3) The Secretary's "action in listing species as endangered or threatened furthers the purpose of NEPA even though no impact statement is filed. *Id.* at 837. (4) The legislative histories of both ESA and NEPA support the view that the Secretary is exempt from compliance with NEPA process when making a decision to list a species under ESA. *Id.* at 838-40.

Every federal agency is expected to comply with NEPA unless there is a statutory conflict with the agency's authorizing legislation that expressly prohibits or makes full compliance impossible. *See* H.R.Conf.Rep. No. 91-765, 91st Cong., 1st Sess. (1969), reprinted in [1969] U.S.Code Cong. & Admin.News 2767, 2770; *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma,* 426 U.S. 776, 787-88, 96 S.Ct. 2430, 2437-38, 49 L.Ed.2d 205 (1976).

In *Flint Ridge, supra,* the issue was whether the Department of Housing and Urban Development had to file an impact statement before allowing a disclosure letter filed by a private developer to become effective. HUD argued it did not, because (1) it had only limited discretion and no power to consider environmental concerns, and (2) it had to act within 30 days or the disclosure letter automatically became effective and this time-table made compliance with NEPA impossible. The Court found preparation of the impact statement inconsistent with HUD's statutory duties because of the time constraint and did not reach the first argument. *See* 426 U.S. at 787-91, 96 S.Ct. at 2437-40.

In *Pacific Legal Foundation v. Andrus,* the court addressed the issue left open by the Supreme Court in *Flint Ridge* and found that, because there was a conflict between NEPA and ESA's statutory procedures relating to the listing of a species as threatened or endangered, no NEPA compliance was required when listing decisions were made.

The statutory mandates and procedures applicable to listing threatened or endangered species are distinguishable from those governing the designation of critical habitat. Therefore, although the analysis in *Pacific Legal Foundation v. Andrus* is useful in deciding the issue, it is not controlling in this action.

1. In *Pacific Legal Foundation v. Andrus*, the court found that compliance with NEPA process when making listing decisions under ESA "does not and cannot serve the purpose of the Endangered Species Act." *See,* 657 F.2d at 835. The reason for the court's conclusion was that the Secretary is required to list a species as endangered or threatened based on five factors set forth in ESA. "The Secretary does not have the discretion to consider the five factors to be considered in filing an impact statement." *Id.* The court reasoned that the requirement of NEPA to address procedurally that which cannot be considered substantially under ESA indicates that NEPA was not meant to apply. *Id.* at 835-36.

FWS argues that "as in its original decision to list a species, FWS does not have the discretion to consider the wide range of impacts required to be analyzed in preparing NEPA documentation." Memorandum in Support of Defendant's Motion (# 62), p. 37. Therefore, FWS concludes that "the tension that the Sixth Circuit found to exist between NEPA and ESA in the context of listing decisions also exists in the context of critical habitat designation." *Id.*, pp. 37-37.

The critical habitat designation process is set forth in 16 U.S.C. § 1533(b)(2). First, FWS must identify areas that meet the scientific definition of critical habitat found in 16 U.S.C. § 1532(5)(A). Then, FWS is to consider the economic and other relevant impacts of designation for each area. After consideration of the economic and other relevant impacts, FWS must determine whether any identified areas should be excluded from the final critical habitat designation because the benefits of exclusion outweigh the benefits of designation. Regardless of considerations relevant to the exclusion determination, FWS must designate an area if the failure to do so would result in extinction of the species.

Thus, FWS has the discretion to consider the "economic impact and **any other relevant impact** of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). "[A]ny other relevant impact" can logically be construed as including the wide range of impacts required to be analyzed in preparing NEPA documentation. I am not persuaded by defendant's attempt to distinguish between the exercise of discretion with respect to the "designation process" as opposed to the "exclusion process." The exclusion process is part of the designation process in that it results in the identification of the area determined to be appropriate for final designation. Therefore, to argue that discretion can be exercised only with respect to excluding identified critical habitat from final designation is a matter of semantics.

The fact that FWS discretion to exclude a specific area from final designation is ultimately limited if doing so would result in the extinction of the species, does not alter the fact that it generally has wide discretion in exempting certain areas, short of the extinction scenario. *See Forelaws on Board v. Johnson,* 743 F.2d 677, 680-681 (9th Cir.1984) [declining to follow reasoning of *Pacific Legal Foundation v. Andrus* in part because the action the statute required the

agency to take included broad discretionary obligation to adopt measures to protect the environment.]

Defendant also argues that the designation process already obligates FWS to prepare a complete analysis of all of the impacts relevant to its decision on final habitat designation and that any impacts examined in a NEPA document would unnecessarily duplicate information FWS has already developed and analyzed pursuant to 16 U.S.C. § 1533(b)(2).[4]

Although the statutes require an analysis of impacts that is similar in some respects, defendant has argued that the NEPA process requires analysis of a wide range of impacts not contemplated under ESA. Further, defendant states: "FWS is not contending that it has *met* the requirements of NEPA, it is contending that it is *exempt* from the requirements of NEPA." Reply Memorandum (# 72), p. 9, n. 7. Therefore, defendant acknowledges that NEPA requires a wider range of analysis than required by ESA.

Based on the foregoing, I find that to impose the procedural steps required by NEPA in addition to those FWS must take under ESA would not "either duplicate information FWS already has to develop and analyze . . . or represent information that FWS may not legally consider in the designation process." Memorandum in Support (# 62), pp. 38-39. Contrary to defendant's argument, there are no clear "bright lines" that limit the impacts the Secretary may consider in designating critical habitat NEPA review is designed to

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[4] This argument has the ring of a "functional equivalent" argument. However. despite the suggestion in *Pacific Legal Foundation v. Andrus* that ESA may now provide the functional equivalent of an impact statement when critical habitat is designated, *See* 657 F.2d at p. 835, defendant contends that it is not making a functional equivalent argument. In relying exclusively on an exemption argument, defendant seems to be putting all of their eggs in one arguably vulnerable basket.

require consideration of all of the implications of the proposed agency action. Such a review is not incompatible with the purpose or the requirements of ESA, and there are no conflicting statutory mandates. The fact that ESA has a similar, although less extensive, impacts review and analysis requirement supports the conclusion that the NEPA process serves the purpose of ESA.

2. The second determining factor in *Pacific Legal Foundation v. Andrus* was the court's conclusion that preparation of an EIS would not serve the purpose of NEPA because "the statutory mandate of ESA prevents the Secretary from considering the environmental impacts when listing a species as endangered or threatened." *See* 657 F.2d at 836.

As noted above, NEPA is primarily a procedural statute to insure that an agency considers the environmental impacts of its actions. The EIS is evidence that environmental concerns were considered by the agency. In *Pacific Legal Foundation v. Andrus*, the court held that the impact statement "cannot insure the agency made an informed decision and considered environmental factors where the agency has no authority to consider environmental factors." *Id.*

Defendant contends that similar restrictions on the Secretary's discretion in designating critical habitat render the examination of environmental effects irrelevant to the ultimate decision. "Because the designation of critical habitat is circumscribed by considerations of only the 'best scientific data,' 16 U.S.C. § 1533(b)(2), FWS is prevented from considering any environmental impacts other than those economic and other impacts relevant to the exclusion process." Reply Memorandum (# 72), p. 9.

As discussed above, defendant's argument in this regard is based on an unreasonably restrictive interpretation of ESA. Although the initial identification of critical habitat is to be based on "the best scientific data available," 16 U.S.C.

§ 1533(b)(2), the identification of habitat is the beginning and not the end of the statutory process. After critical habitat has been identified, it is subject to review and analysis in terms of economic and other relevant impacts to determine which areas identified as within the strict statutory parameters of critical habitat should be excluded from final designation. I find that the Secretary's discretion to consider environmental impact is not as "circumscribed" as defendant contends and that developing NEPA documentation for critical habitat designation does serve the purpose of NEPA.

Defendant also contends that because a critical habitat designation represents a mandatory obligation that FWS must perform once it decides to list a species, it is not the type of agency action that is possible to be influenced by considerations identified in NEPA documentation. In other words, "designation is not a 'proposal' to act that FWS may decide whether or not to adopt. *See* 40 CFR § 1502.14(d) (requiring inclusion of a 'no action' alternative in EIS's discussion of alternatives)." Memorandum in Support (# 62), p. 41. However the exclusion provisions of the statutory scheme in a sense make the decision to designate specific areas similar to "proposals" to act in a certain way and a decision to exclude a certain specific area can be compared to the adoption of a "no action" alternative.

I find that because the statutory requirements and limitations are factually distinguishable, the *Pacific Legal Foundation v. Andrus* conclusion that filing an EIS in the context of listing would not serve the purpose of NEPA is not applicable to critical habitat designation.

3. The third basis for the Court's decision in *Pacific Legal Foundation v. Andrus* was that "the Secretary's action in listing species as endangered or threatened furthers the purpose of NEPA even though no impact statement is filed." *See* 657 F.2d at p. 837. Defendant contends that the

designation of critical habitat, like listing decisions, serves the environmental goals of NEPA, even if it is not accompanied by preparation of NEPA documentation.

Reduced to its essence, defendant's argument in this regard is that NEPA does not apply to agencies whose function it is to protect the environment. Although the court in *Pacific Legal Foundation v. Andrus* concluded that Congress did not intend to have NEPA apply to "environment enhancing agencies," *see* 657 F.2d at p. 838, n. 11, the Ninth Circuit has taken a different view.

First, as noted in *Pacific Legal Foundation v. Andrus,* some courts have recognized that one of the purposes of NEPA is to inform Congress, the Executive and the public about the environmental consequences of various agency actions. The Ninth Circuit is one such court. *See Trout Unlimited v. Morton,* 509 F.2d 1276, 1282 (9th Cir.1974). Although designation of critical habitat could serve NEPA's environmental enhancement goals without the preparation of an EIS, the secondary informative function of NEPA is not met unless analysis and documentation takes place.

Secondly, while some cases have indicated that agencies whose mission it is to protect the environment are exempt from NEPA requirements, the Ninth Circuit has applied this rule very narrowly. The leading case on this issue is *Flint Ridge Development v. Scenic Rivers Ass'n of Oklahoma, supra,* in which the court held that NEPA requires all agencies to comply with its requirements unless there is a clear and unavoidable statutory conflict. As discussed above, there is no such conflict in the present case.

Requiring the Secretary to file an impact statement or conduct an environmental assessment under the circumstances of this case would not necessarily "hinder . . . efforts at attaining the goal of improving the environment." *Pacific Legal Foundation v. Andrus, supra* at 837. Even if the

purpose of the agency or the agency action (designating critical habitat in this case) is to enhance the environment or maintain the status quo, the environmental consequences of a particular agency action cannot be determined absent an environmental assessment.

Judge Frye addressed this issue in *Portland Audubon Society v. Lujan,* (D.Or. 1992), 795 F.Supp. 1489, in which the BLM argued it was exempt from NEPA, because (1) the requested relief under the NEPA claim conflicted with the O & C Act, 43 U.S.C. § 1181 et seq.; and, (2) it should be excused from complying with NEPA because the failure to comply would, in effect, have a positive environmental impact.[5]

In resolving the issue, Judge Frye did not find either argument persuasive. As to the positive environmental impact theory that the agency's non-action would in effect preserve habitat, she noted that such a "conclusion . . . would allow the BLM to continue to act insulated from public comment because of its own delay in examining the environmental consequences of its actions." *Portland Audubon Society v. Lujan, supra* at 1507. Similarly, in this case, the contention that designation of critical habitat enhances environmental quality presumes a conclusion that is not clear absent an environmental assessment.

Under the law of the Ninth Circuit, environmental enhancing agencies and actions are not exempt from NEPA absent a clear and unavoidable statutory conflict. The relevant inquiry in each case is whether the proposed action has a significant impact on the quality of the human environment. This question cannot be answered without at least

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[5] Although the BLM is not necessarily an agency "whose function it is to protect the environment," it's non-compliance with NEPA was allegedly an environment enhancing action in that case.

going through the preliminary environmental assessment stage. *See Jones v. Gordon,* 792 F.2d 821 (9th Cir.1986). It is only through the analysis mandated by NEPA that the true impacts of an agency action can be identified and evaluated.

4. In *Pacific Legal Foundation v. Andrus,* the court found: "Though not without ambiguity, the legislative history suggests that NEPA was not intended to be applied to agencies whose function was to protect the environment." *See* 657 F.2d at 838. While observing that the legislative history of the Endangered Species Act of 1973 is "very sparse," the court concluded "Viewing all of the legislative history of both acts, this court concludes that Congress intended listing of a species as endangered or threatened to be a mandatory act dependent upon the five factors found in ESA and not upon environmental impact concerns found in NEPA and that Congress did not intend to require the Secretary to file an environmental impact statement before listing a species as endangered or threatened under ESA." *Id.* at 839-40.

Defendant contends that the legislative histories of NEPA and ESA indicate that Congress did not intend for NEPA to apply to designation of critical habitat under ESA.

The Court in *Pacific Legal Foundation v. Andrus* acknowledged that NEPA's legislative history was not without ambiguity. Although the Sixth Circuit concluded that NEPA was not intended to be applied to agencies whose function is to protect the environment, as discussed above in Section 3, the Ninth Circuit has taken the position that NEPA applies to every major federal action absent a clear and unavoidable statutory conflict.

NEPA had been in effect approximately nine years when Congress amended ESA in 1978. As part of the 1978 amendments, Congress provided that the Secretary was

required to consider the economic effects and other relevant impacts of the designation of critical habitat and publish an evaluation of any activities that may be impacted by the designation. Defendant argues that these clearly are steps that NEPA and the implementing regulations already required of federal agencies when contemplating a proposed major federal action significantly affecting the quality of the human environment. "In making these amendments to ESA therefore, Congress must have been operating under the assumption that NEPA did not apply to critical habitat designation because otherwise such amendments would have been largely superfluous. *See Merrell v. Thomas*, 807 F.2d 776, 780 (9th Cir.1986)." Memorandum in Support (# 62), p. 43.

Were there no other legislative history the implication suggested by defendant's argument might be convincing. However, I find from other aspects of the legislative history of the 1978 amendments that the most reasonable interpretation of legislative intent is that the application of NEPA to designation of critical habitat depends on whether the specific designation is a major federal action. This conclusion is consistent with the Sixth Circuit's opinion in *Pacific Legal Foundation v. Andrus*. *See* 657 F.2d p. 840, n. 13.

During debates relative to the 1978 amendments to ESA, Senator McClure introduced an amendment defining the designation of critical habitat as a major federal action significantly affecting the quality of the human environment, requiring the filing of an EIS. *See* Cong.Rec. 21587, July 19, 1978. This amendment was originally offered in committee and rejected. When it was offered again in the Senate floor, Senator Wallop spoke in opposition. His opposition was not based on the belief that ESA should be exempt from NEPA, but rather on the basis that it would make filing an EIS an absolute requirement when in fact many designations would not be major federal actions.

Cong.Rec. 21589, July 19, 1978. Senator Wallop's comments indicate he believed ESA's "silence . . . surely does not prohibit suits to compel that environmental impact statements be filed under the provisions of NEPA if the action is determined to be a major Federal action. *Id.* Senator McClure agreed with Senator Wallop and indicated his desire to "underscore" the possibility that an EIS may be required in connection with the designation of critical habitat. *Id.* Senator McClure emphasized that he did not want the record to suggest that absent a specific statutory requirement of an EIS, that an EIS would never be required. *Id.* Although the remarks of individual legislators should not be given controlling effect, *Northern Colorado Water Conservancy Dist. v. FERC,* 730 F.2d 1509, 1518 (D.C.Cir.1984), *see also In re Kelly,* 841 F.2d 908, 912 (9th Cir.1988), I believe that this discourse indicates that ESA's silence regarding NEPA's requirements represents a considered choice to leave NEPA requirement determinations dependent upon the facts of each particular situation. Support for this position is found in the Conference Report in which it is noted: . . . Where critical habitat is specified . . . actual notice of the regulation and any environmental assessment or environmental impact statement prepared on it *is* required to be given to all general local governments within or adjacent to the proposed critical habitat at least 60 days prior to the effective date. 1978 U.S.Code Cong. and Administrative News 9484, 9494.

Based on the above analysis, I find that the reasoning in *Pacific Legal Foundation v. Andrus* does not lead to the conclusion that FWS is exempt from NEPA requirements when designating critical habitat. The court's conclusion in that case was specifically limited to listing decisions which are statutorily distinguishable from the critical habitat designation process. The rationales for the court's conclu-

sion in *Pacific Legal Foundation v. Andrus*, are simply not present when the reasoning is examined in terms of critical habitat designation.

Amicus Curiae Headwaters, et al., opposition:

Headwaters opposes Douglas County's motion on the grounds that: (1) an EIS is not required for actions that do not change the physical environment, and (2) an EIS would not promote the environmental purposes of ESA or NEPA. Headwaters' second ground essentially relies on *Pacific Legal Foundation v. Andrus*, which as discussed above does not control in this action.

Headwaters' contention that NEPA does not apply to actions that don't change the physical environment is more problematic.[6] However, regardless of the merits of Headwaters' argument in this regard, it cannot be determinative of the issue before the court because it assumes a fact not in evidence. That is, Headwaters' argument assumes that the designation decision will not effect changes in the physical environment. As noted above, that presumption is not necessarily accurate. For example plaintiff has presented evidence that allowing more area to acquire old-growth characteristics may impact species with different habitat requirements. In short, it is not a "given" that defendant's designation of critical habitat will enhance or merely preserve the existing environmental status quo.

CEQ regulations require NEPA documentation where a major federal action has both beneficial and adverse effects,

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[6] A similar argument was characterized as follows: "In essence plaintiffs claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone." *National Association of Property Owners v. U.S.*, 499 F.Supp. 1223, 1265-66 (D.Minn.1980), aff'd, 660 F.2d 1240 (8th Cir.1981). The court was not persuaded by this argument.

"even if the Federal agency believes that on balance the effect will be beneficial." 40 CFR § 1508.27(b)(1); *see Environmental Defense Fund v. Marsh,* 651 F.2d 983, 993 (5th Cir.1981). In this case, the designation of critical habitat allegedly has beneficial effects for the Northern Spotted Owl, but adverse effects on other species and adverse socio-economic effects on the human environment. NEPA documentation must be prepared in such a mixed effects situation. *American Horse Protection Ass'n v. Andrus,* 608 F.2d 811, 814-815 (9th Cir.1979). As discussed above, the full range of environmental effects of a particular agency action cannot be determined without at least engaging in the preliminary NEPA process of conducting an environmental assessment.

I find that all federal agencies are required to comply with NEPA when considering major federal actions that significantly affect the quality of the human environment, unless there is a clear and unavoidable statutory conflict. There is no such statutory conflict here. The threshold question of whether there is an effect on the human environment is a question that is to be answered through the environmental assessment and impact analysis of NEPA, a process which was not followed in the designation of critical habitat in this case.

Defendant argues that the Court should decline to grant the injunction plaintiffs seek even if it should find FWS to be in violation of required statutory procedures because such an "injunction is not warranted on a balancing of equitable factors at issue in the case and would call for FWS to violate a

federal District Court order and competing statutory mandate" Memorandum in Support (#62), p. 46.[7]

Although the Secretary is under a court-imposed mandate to designate critical habitat, this mandate stops short of authorizing the Secretary to ignore the relevant provisions of NEPA or ESA. The court ordered FWS to ". . . publish its proposed critical habitat plan no later than forty-five (45) days thereafter. The final rules shall be published at the earliest possible time permitted under the appropriate regulations." *Northern Spotted Owl et al. v. Manuel Lujan*, *supra* at 629-630. Therefore, although the court ordered that the final rule relative to critical habitat be published, it did not imply an exemption from NEPA or ESA requirements. Granting the relief plaintiff seeks in this case would not result in the violation of a federal district court order.

In balancing the equities, I find that the severe hardship to Douglas County and other areas affected by the Secretary's designation and the public interest in requiring compliance with environmental laws tips the scales decidedly in plaintiff's favor. The social and economic impacts as well as the biological uncertainty to other species justifies an injunction until the defendant complies with the provisions of NEPA.

Plaintiff and Intervenor plaintiffs' motions for summary judgment (# 15, # 36, # 41) are allowed. Defendant's motion for summary judgment (# 60) is denied. Plaintiff and Intervenor plaintiffs are allowed 20 days to apply to the court for appropriate relief, with a proposed form of order. That

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[7] The final rule designating critical habitat has already been adopted. Therefore, plaintiffs request for injunctive relief is moot. Accordingly plaintiff's claim is construed as seeking declaratory relief and *setting aside* the designation of critical habitat. The same balancing of equities applies to either way the requested relief is viewed.

filing should be calendared by the clerk so defendant can submit a response to the proposed order.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 93-36013 and 93-36016

DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, PLAINTIFF-APPELLEE

vs.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, UNITED STATES DEPARTMENT OF THE INTERIOR, DEFENDANT-APPELLANT

DOUGLAS COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OREGON, PLAINTIFF-APPELLEE

vs.

BRUCE BABBITT, DEFENDANT

and

HEADWATERS, INC.; UMPQUA VALLEY AUDUBON SOCIETY, DEFENDANTS-INTERVENORS-APPELLANTS

[Filed June 5, 1995]

ORDER

Before: PREGERSON and TROTT, Circuit Judges, and FITZGERALD, Senior District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Pregerson and Trott voted to reject the suggestion for rehearing en banc and Judge Fitzgerald would so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable James M. Fitzgerald, Senior United States District Judge for the District of Alaska, sitting by designation.

APPENDIX D

1. 16 U.S.C. 1532(5) provides as follows:

§ 1532. Definitions

For the purposes of this chapter —

. . . .

(5)(A) The term "critical habitat" for a threatened or endangered species means —

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

2. 16 U.S.C. 1533(a)(3), (b)(2), (b)(5), (b)(6)(A) and (b)(6)(C) provide as follows:

§ 1533. Determination of endangered species and threatened species

(a) Generally

. . . .

(3) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable —

(A) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(B) may, from time-to-time thereafter as appropriate, revise such designation.

(b) Basis for determinations

. . . .

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, or specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

. . . .

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or

revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall —

(A) not less than 90 days before the effective date of the regulation —

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

(C) give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

(D) publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

(E) promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

(6)(A) Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register—

(i) if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either—

(I) a final regulation to implement such determination,

(II) a final regulation to implement such revision or a finding that such revision should not be made,

(III) notice that such one-year period is being extended under subparagraph (B)(i), or

(IV) notice that the proposed regulation is being withdrawn under subparagraph (B)(ii), together with the finding on which such withdrawal is based; or

(ii) subject to subparagraph (C), if a designation of critical habitat is involved, either —

(I) a final regulation to implement such designation, or

(II) notice that such one-year period is being extended under such subparagraph.

. . . .

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that —

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that

time, designating, to the maximum extent prudent, such habitat.

3. 16 U.S.C. 1536(a)(2) provides as follows:

§ 1536. Interagency cooperation

(a) Federal agency actions and consultations

. . . .

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

APPENDIX E

42 U.S.C. 4332(2)(C) provides as follows:

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall —

. . . .

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the

Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

. . . .

Supreme Court, U.S.
FILED
NOV 1 1995
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(2)

No. 95-371

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

DOUGLAS COUNTY, OREGON
Petitioner,
v.
BRUCE BABBITT, SECRETARY OF THE INTERIOR
HEADWATERS, INC., AND UMPQUA VALLEY AUDUBON SOCIETY
Respondents.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, TEXAS CAPITOL AREA BUILDERS ASSOCIATION, OREGON STATE HOME BUILDERS ASSOCIATION, AND UMPQUA VALLEY HOME BUILDERS ASSOCIATION IN SUPPORT OF PETITIONER

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The National Association of Home Builders of the United States ("NAHB") and the Texas Capitol Area Builders Association ("TxCBA") have received the written consent of the parties to file this brief in support of Petitioner Douglas County, Oregon, and have filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The NAHB represents more than 180,000 builders and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.[1]

The TxCBA is a not-for-profit corporation organized under the laws of the State of Texas. TxCBA is an NAHB affiliate, representing over 700 members employing in excess of 8,000 people regularly conducting business related to the housing industry in the Austin, Texas area.[2]

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[1] The NAHB has been before this Court either as an *amicus curiae* in support of, or as of counsel on behalf of, the property owner in prior cases involving government land use decisions. *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994); *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992); *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, reh'g denied, 478 U.S. 1035 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The NAHB brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

[2] NAHB and TxCBA have filed an action against Secretary Babbitt — *NAHB v. Babbitt*, Civ. No. 1:95CV01552 JLG (D.D.C. 1995) —challenging

(footnote continues)

The Oregon State Home Builders Association ("Oregon HBA") is a for-profit corporation organized under the laws of the State of Oregon. The Oregon HBA is an NAHB affiliate, representing over 4,814 members organized in 17 local organizations throughout Oregon.

The Umpqua Valley Home Builders Association ("Umpqua Valley HBA") is a not-for-profit corporation organized under the laws of the State of Oregon. The Umpqua Valley HBA is an NAHB affiliate, representing 156 members doing business in Douglas County, Oregon — the geographic subject of this action. The ultimate resolution of this action, while important to all NAHB members, is of particular importance to these builders.

The Building Industry Amici's interests lie in seeing that the implementation of laws concerning or affecting the use of private property remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with government actions which impinge on constitutional guarantees.[3] The Building Industry Amici have a particular interest in the administration of federal environmental statutes, such as the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370d and the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, given the far-reaching impact that these laws have upon private land use and land-use regulation.

(footnote continued)

the Interior Department's failure to comply with the National Environmental Policy Act in its listing of the Golden-cheeked Warbler as endangered. This action involves issues similar to those raised by petitioner in this case.

[3] As Justice Brandeis insightfully admonished:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

The Building Industry Amici believe that this brief will assist the Court in making its decision whether to grant review of the issues presented in the Petition. The Building Industry Amici's concerns are much broader than those of Petitioner Douglas County, Oregon, since its members are faced with countless regulatory decisions on a daily basis across the nation that affect the use of privately held land. The Building Industry Amici's brief addresses the broader public policy reasons why review should be granted.

SUMMARY OF THE REASONS FOR GRANTING THE WRIT

The Court should grant Petitioner's writ because the lower court has decided a question of national importance in a way that conflicts with this Court's precedents. The Court has made it clear that one of the fundamental purposes of the NEPA is to provide to decisionmakers and the public at large information regarding the environmental impacts of federal decisions. The lower court's decision frustrates this purpose even though there is no necessity for doing so, and contravenes the mandate of this Court that the NEPA's requirements may be dispensed with only where another law makes compliance impossible.

Compliance with the NEPA in designating critical habitat is of great importance. The Secretary has already designated critical habitat for dozens of species covering millions of acres and hundreds of river miles; hundreds of other species still await designation of critical habitat. These designations can have significant environmental impacts. Only through compliance with the NEPA will these impacts be fully explored and disclosed to the public as intended by Congress.

REASONS FOR GRANTING THE WRIT

A. The NEPA Process Serves As A Vital Information Resource

Through the NEPA, federal agencies historically have ensured that they possess sufficient information concerning the environmental impacts of a proposed federal action to make an informed judgment about whether to proceed with the action. Yet federal agencies are not the sole focus for making this information available through the NEPA. The NEPA's policies are fully achieved only if the President, the Congress, state and local agencies, and the general public also have the opportunity to assess the information that is collected by federal agencies concerning the environmental consequences of a government action. These policies which include, *inter alia*:

1) "To declare a national policy which will *encourage* productive and enjoyable harmony between man and his environment;"

2) "[T]o *promote* efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man;" and,

3) "[T]o *enrich the understanding* of the ecological systems and natural resources important to the Nation."

42 U.S.C. § 4321 (emphasis added). These goals are realized "through a set of 'action-forcing' procedures that require that agencies take a "hard look' at environmental consequences,' . . . and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)). Thus, one of the clear benefits derived from the proper application of the NEPA is the availability of information regarding the environmental consequences of government actions.

By evaluation, investigation, and assessment, along with the dissemination of information gathered through the NEPA

process, federal agencies ensure not only that they possess information sufficient to make an environmentally sound decision, but also that the President, Congress, and the general public possess this same information. These other parties — through their possession and understanding of this information — not only can evaluate federal agency decisions, but they can also act in their own capacities based upon this information.

Absent the dissemination of this information, it is not possible to *encourage* productive and enjoyable harmony, or to *promote* efforts preventing environmental damage, or certainly to *enrich the understanding* of the Nation's resources. Moreover, the withholding of information frustrates

> the continuing policy of the Federal Government, in cooperation with state and local governments, and other concerned public and private organizations, to use all practicable means . . . to create and maintain conditions under which man and nature can exist in productive harmony . . .

42 U.S.C. § 4331 (a). Indeed, "[t]he Congress recognizes . . . that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331 (c).

While common sense alone dictates that the widespread dissemination of information is critical to furthering the NEPA's goals, Congress acted to ensure the dissemination of information by codifying this requirement. Section 4332 (c) clearly provides that Environmental Impact Statements ("EIS") prepared pursuant to the NEPA:

> *shall* be made available to the President, the Council on Environmental Quality and to the public . . . and *shall* accompany the proposal through the existing agency review processes[.]

42 U.S.C. § 4332 (emphasis added). Thus, federal agencies are mandated by Congress to disseminate copies of an EIS prepared

pursuant to the NEPA. The "[p]ublication of an EIS . . . serves a larger informational role. It gives the public the assurance that the agency 'has indeed considered environmental concerns in its decisionmaking process[.]' " *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349 (quoting *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983)).

The Ninth Circuit's decision below frustrates the purposes of the NEPA by halting the flow of information in the context of the ESA critical habitat designation. As argued above, this Court has clearly recognized that the NEPA goes beyond providing information to the federal agency during the rulemaking process, since it "also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 349. Furthermore, as argued below, the enforcement of the NEPA with respect to the designation of critical habitat under the ESA is required in furtherance of Congressional directive and policy.

B. The NEPA Applies To The Designation Of Critical Habitat Under The Endangered Species Act

1. There Is No Conflict Between The NEPA And The ESA

This Court has interpreted the NEPA provision directing the application of that act "to the fullest extent possible" to be a "deliberate command." *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787 (1976). "[E]ach agency of the Federal Government *shall* comply with the directives set out in (s 102(2)) *unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible . . . " *Flint Ridge Dev. Co.*, 426 U.S. at 787-788 (quoting 115 Cong. Rec. 39703 (1969) (House conferees); 115 Cong. Rec. 40418 (Senate conferees)) (other citation omitted).

Absent a "*clear and unavoidable conflict* in *statutory authority*", the NEPA is applicable to all major federal actions. *Flint Ridge Dev. Co.*, 426 U.S. at 788; *Metropolitan Edison Co. v. U.S. Nuclear Regulatory Comm'n*, 460 U.S. 766, 772 (1983) ("[W]here an agency action significantly affects the quality of the human environment, the agency must evaluate the 'environmental impact' and any unavoidable adverse environmental effects of its proposal"); *Robertson*, 490 U.S. at 350 ("NEPA itself does not mandate particular results, but simply prescribes the necessary process"); *Concerned About Trident v. Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976) ("There is no support in either the statute or the cases for implying a 'national defense' exemption from NEPA"); *Izaak Walton League v. Marsh*, 655 F.2d 346, 367 (D.C. Cir. 1981) (NEPA applicable absent clear conflict).

There is no "clear and unavoidable conflict" between the NEPA and the Endangered Species Act, nor is there any statutory exemption from the NEPA in the ESA.[4] The NEPA — by its clear statutory language — applies to the designation of critical habitat pursuant to the ESA.[5] Thus, the lower court's decision flies in the face of this Court's precedents.

2. The NEPA's Application To The Designation Of Critical Habitat Is Important To Private Property Owners

Critical habitat designations are made by the Secretary of Interior "on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact," of such designation. 16 U.S.C. § 1533 (b)(2). If the benefits of excluding an area from a critical habitat designation outweigh the benefits of its inclusion, the

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[4] On other occasions, Congress has affirmatively acted to create statutory exemptions from the NEPA. That it has not done so with the ESA is clear evidence that it intended the NEPA process to apply to actions taken pursuant to the ESA.

[5] Secretary Babbitt does not claim that the designation of critical habitat is not a major federal action affecting the human environment.

Secretary of the Interior may exclude the area from a critical habitat designation.[6]

Economic and other relevant factors constitute information typically included in a NEPA EIS, which is designed to analyze a wide range of impacts on the human environment.[7] Mere statements, however, in a preamble to a critical habitat designation regulation do not provide solid evidence that such factors were given the requisite "hard look" by the Secretary. *See Douglas County v. Lujan*, 810 F. Supp. 1470, 1480 (D. Or. 1992). The preparation of an EIS regarding the designation of critical habitat ensures a comprehensive and systematic examination of all relevant impacts while also permitting the President, the Congress, state and local agencies, as well as the general public to evaluate the Secretary's decision in the context of such factors.

The general public's access to this information is most important. As of May 1993, 90% of the 781 species listed as endangered or threatened under the ESA inhabit non-federal lands. Of these listed species, 517 have over 60% of their total habitat on non-federal lands.[8]

The habitat for these species and the 184 species that have been listed as endangered or threatened since May 1993 covers tens of millions of acres, much of it private property, and hundreds, if not thousands, of river miles. The Secretary has already designated critical habitat for some 115 species covering millions

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[6] *Id.* If the exclusion of an area from a critical habitat designation will lead to the extinction of a species, the Secretary may not exclude that area from the designation on economic or other grounds. 16 U.S.C. § 1533 (b)(2).

[7] The Ninth Circuit provides no basis for its assertion that the Secretary cannot take into account a wide variety of environmental impacts when designating critical habitat. The statute requires consideration of "relevant impacts" without limiting in any way the scope of impacts that may be relevant. It would be odd to allow the Secretary to decline to designate an area of critical habitat because of economic impacts, but not because of other environmental impacts.

[8] *See* General Accounting Office, Endangered Species Act: Information on Species Protection on Non-Federal Lands, 4-5 (Dec. 1994).

of acres.[9] The designation of such critical habitat imposes on all federal agencies an obligation to ensure that their actions will not result in the adverse modification of that critical habitat. 16 U.S.C. §1536(a)(2). This obligation extends to all types of federal actions, including actions relating to private property, *e.g.*, federal funding for state, local, and private projects; issuance of federal permits to discharge dredged or fill material into wetlands and other waters of the United States pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344; issuance of other permits under the Clean Water Act, 33 U.S.C. §§ 1251-1387; and the Clean Air Act, 42 U.S.C. §§ 7401-7671q; and, the provision of federal flood insurance. These prohibitions are likely to be extended to tens of millions of additional acres in the future as the Secretary designates critical habitat for some of the 800 endangered and threatened species currently lacking critical habitat designations or some of the more than 3000 species that are currently candidates for listing under the ESA.[10]

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[9] For example, the Secretary has designated approximately 6.9 million acres as critical habitat for the Northern spotted owl in this case; 4.6 million acres for the Mexican spotted owl, 60 *Fed. Reg.* 29914 (1995); 6.4 million acres for the desert tortoise, 59 *Fed. Reg.* 5827 (1994); and 6.3 million acres for the gray wolf, 50 C.F.R. § 17.95 (a). In addition, the Secretary has designated 1,980 miles of the Colorado River and its tributaries as critical habitat for four fish species, 59 *Fed. Reg.* 13374 (1994); and has designated the entire Sacramento-San Joaquin River delta — which lies at the heart of the water system serving much of the State of California — as critical habitat for the delta smelt, 59 *Fed. Reg.* 65256 (1994).

[10] For instance, the Secretary has proposed to designate 4.45 million acres in three states as critical habitat for the marbled murrelet, 60 *Fed. Reg.* 40892 (1995), 860,000 acres of lake, stream and shoreline for the Lost River sucker and the shortnose sucker, 60 *Fed. Reg.* 5893 (1995), and 20,000 acres on 210 miles of coastline (10% of the California, Oregon and Washington coastline) for the Western snowy plover, 60 *Fed. Reg.*25882 (1995). The Secretary at one time considered a proposal to designate portions of 33 Texas counties as critical habitat for the Golden-cheeked Warbler. Scott Harper, *Endangered: Species or Rights*, Houston Post, August 28, 1994 at A1. Other newly listed and candidate species also have extensive ranges. The Southwestern willow flycatcher is thought to inhabit

(footnote continues)

The designation of critical habitat, particularly on this scale, can have significant environmental impacts of the type that would typically be discussed in an EIS. The district court noted the environmental impacts that could reasonably be expected to result from the designation of critical habitat for the Northern Spotted Owl including impacts on the economy, employment, public and social services.[11] Other designations can be expected to have similar effects. For instance, while designation of critical habitat for a species may tend to preserve the designated habitat, the designation will at the same time push development and other human activities into other nearby areas which will undoubtedly serve as habitat for other species.

Clearly, given these numbers, the impact of critical habitat designation has a massive impact on the human environment. If the federal government is going to initiate an action such as the designation of private land as critical habitat for an endangered species, which brings a host of restrictions and prohibitions upon the use of land, it is not unreasonable for those impacted by the decision to have full access to information concerning the extent of those impacts. Indeed, "the EIS serves the function of offering [ ][property owners and builders] adequate notice of the expected consequences [of an agency decision] and the opportunity to plan and implement corrective measures in a timely manner." *Robertson*, 490 U.S. 332, 350 (1989). Absent this information, builders are operating in the dark — or at least in a murky half-light — unable to either fully participate in the rulemaking process or to plan for the eventual and probable impacts of the critical habitat designation.

(footnote continued)

portions of seven states. 60 *Fed. Reg.* 10694 (1995). The Northern goshawk, a species which the Secretary has determined may warrant listing as endangered or threatened, is found throughout much of the conterminous United States. *See* 59 *Fed. Reg.* 58982, 58990 (1994) (goshawk historically has nested in 26 states and regularly visited 19 others).

[11] These impacts are of the type that may be considered in an EIS. *See* 40 C.F.R. § 1508.8.

CONCLUSION

Therefore, for the reasons stated above, and in the Petition for Writ of Certiorari, the NAHB, TxCBA, Oregon State HBA, and Umpqua Valley HBA pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1995

DOUGLAS COUNTY, OREGON,
Petitioner,

v.

BRUCE BABBITT, Secretary of the Interior, HEADWATERS, INC., and UMPQUA VALLEY AUDUBON SOCIETY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DOUGLAS COUNTY, OREGON

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DOUGLAS COUNTY, OREGON

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this amicus curiae brief in support of petitioner, Douglas County, Oregon. Written consent to the filing of this brief has been granted by

counsel for all parties and copies have been lodged with the Clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 25,000 members and contributors and has litigated many public interest cases, a number of which have involved the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321, *et seq.*) and the Endangered Species Act (ESA) (16 U.S.C. § 1531, *et seq.*). *See, e.g., Pacific Legal Foundation v. Andrus*, 657 F.2d 629 (6th Cir. 1981).

PLF has participated in numerous cases before the United States Supreme Court including *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where its attorneys were counsel of record and *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989); and *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994); where PLF participated as amicus curiae.

Amicus seeks to augment the arguments in the Petition for Writ of Certiorari. PLF believes that its public policy perspective and litigation experience in support of balanced environmental regulation will provide a valuable additional viewpoint with respect to the legal issues presented.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, 48 F.3d 1495 (9th Cir. 1995), is found in petitioner's appendix (App.) at 1a-28a. The opinion of the United States District Court for the District of Oregon, 810 F. Supp. 1470 (D. Or 1992), is found in petitioner's appendix at 29a-58a.

STATEMENT OF THE CASE

The issue in this case is whether the United States Fish and Wildlife Service (FWS) was required to comply with NEPA when it designated 6.9 million acres "critical habitat" for the Northern Spotted Owl, a protected species under ESA. *See* App. at 31a-32a. This is an important question that has the potential to affect hundreds if not thousands of communities, and hundreds of thousands of citizens. The question now stands before this Court in need of final and conclusive resolution.

In determining what areas to include within critical habitat, the Secretary of Interior is to take "into consideration ... **any** ... **relevant impact** of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added). This relevant impact analysis is quite important because the Secretary of Interior can then exclude any area from the critical habitat if, based on the analysis, he determines the benefits of exclusion outweigh the benefits of inclusion. *Id.* The only time exclusion is prohibited is if exclusion would result in extinction of the species concerned. *Id.*

The designation of habitat as critical can have significant relevant impacts on future federal and private activities. Under Section 7 of ESA, 16 U.S.C. § 1536(a)(2), every federal agency shall insure that any action authorized, funded, or carried out by that agency does not destroy or adversely modify critical habitat. Thus, designation of land as critical habitat can have a profound impact on whether the land is able to be productively used. Jon A. Souder, *Chasing Armadillos Down Yellow Lines: Economics in the Endangered Species Act*, 33 NAT. RESOURCES J. 1095, 1122 (1993) (Souder). Additionally, land designated as critical habitat may require "special management," 16 U.S.C. § 1532(5)(A)(i), which in turn may seriously conflict with

not only the productivity of adjacent nondesignated lands but also their environmental well being.

These relevant impacts were the essence of Douglas County's demand that NEPA be complied with. It wanted FWS to take into consideration how federal land management of critical habitat adjacent to county-owned land could cause serious environmental damage through insect, disease, and fire impacts. App. at 129. Douglas County wished to insure that all potential consequences of and alternatives to the proposed habitat designation were well understood and carefully considered prior to designation because, as the District Court ruled, "defendants' designation of critical habitat will profoundly affect the quality of life in Douglas County." App. at 39a.

Had the Secretary complied with NEPA, he would have taken into consideration these relevant impacts and would have evaluated alternative designations that could have avoided significant impacts. Unfortunately, the Secretary took the position that he is exempt from NEPA when designating critical habitat. This decision precipitated the instant suit. App. at 33a.

In response, the District Court ruled there was no basis on which FWS was excused from NEPA compliance prior to finalizing its designation of Northern Spotted Owl critical habitat. The District Court found that because the process and basis for designating critical habitat does not establish a "clear and unavoidable conflict" with NEPA, and because NEPA is to be followed "to the fullest extent possible," NEPA applies. App. at 41a; 56a. Without taking exception to these findings, the Ninth Circuit Court of Appeals nevertheless reversed. App. at 25a.

SUMMARY OF ARGUMENT

Whether FWS must comply with NEPA when designating critical habitat for a species protected under ESA is an important question having national significance. The productive use of private lands in every state will be affected by critical habitat designations. Moreover, habitat designation can have a variety of environmental and other relevant impacts that will not be considered unless FWS follows NEPA. Accordingly, designation decisions must comply with NEPA so that not only biological factors associated with a listed species, but all relevant impacts of a designation are considered.

Additionally, the Ninth Circuit's decision not to require NEPA compliance conflicts with other circuits which follow this Court's *Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-88 (1976), precedent. Furthermore, neither the language of ESA nor its legislative history discloses an intent for ESA to displace NEPA during the process of designating critical habitat. Actually, the Ninth Circuit has substituted its judgment for Congress' by establishing what factors are to be considered in designating critical habitat. Thus, review of the Ninth Circuit's decision is needed not only because the underlying issue has such important national significance but also to reestablish Congress' constitutional authority to determine when a statute is to apply.

REASONS FOR GRANTING THE WRIT

I

THE ISSUE OF COMPLIANCE WITH NEPA PRIOR TO CRITICAL HABITAT DESIGNATION PRESENTS AN IMPORTANT QUESTION OF NATIONAL SIGNIFICANCE

The ESA is one of the strongest, most uncompromising environmental statutes ever passed by Congress. Glears and

Wellmany, *Economics and the Endangered Species Act*, 13 PUB. L. REV. 149 (1992). It prohibits, except under very limited circumstances, the "taking" of a species listed under the Act as either endangered or threatened. 16 U.S.C. § 1538(a)(1)(B). The term "take" has a very broad meaning. Literally, the statute states that the term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). This conduct is prohibited except under very limited circumstances and is subject to civil and criminal enforcement for violation. *See* 16 U.S.C. § 1540(a) and (b).

The Act also precludes certain actions in areas designated as critical habitat of listed species. 16 U.S.C. § 1536(a)(2). The term "critical habitat" includes those specific areas actually occupied by the species and on "which are found those physical and biological features which are essential to the conservation of the species and which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A). Specific areas outside the occupied lands may also be designated if the Secretary determines those areas are essential to the conservation of the species. *Id.* However, the Secretary has a great deal of flexibility over what lands are designated as he is to take into consideration not only biological factors but also the economic impact and ***any other relevant impact*** of specifying any particular area as critical habitat. 16 U.S.C. § 1533(b)(2).

Once an area has been designated as critical habitat for a listed species, there are significant limitations on the use of that land. For example, no activity on federal land and no activity on private land which requires a federal agency authorization or funding may take place if it is likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction, or adverse modification, of that species' critical habitat. 16 U.S.C.

§ 1536(a)(2).[1] Thus, designation of one's land as critical habitat can result in significant impediments to use of the property. It is vital from the landowner's viewpoint for the Secretary of Interior, who has ultimate designation authority, to be fully informed on all aspects of potential critical habitat designations prior to making a final decision. This question of full and adequate information is the underlying issue in this case. What information is required under the law to be produced for the Secretary prior to his designation and determination?

Recently the United States General Accounting Office produced a report entitled *Endangered Species Act Information on Species Protection on Nonfederal Lands* (GAO/RCED-95-16, Dec. 1994). This report acknowledged that, as of May 10, 1993, over 90% (712 out of 781) of the listed species in the United States for which the Fish and Wildlife Service had responsibility, had some or all of their habitat on nonfederal lands. Of the 712 species, over 60% of their total habitat is on nonfederal lands while 264 of the 712 species are completely dependent on nonfederal lands for their habitat. Moreover, private landowners (private citizens and companies or corporations) are the most prevalent type of owners of nonfederal habitat; 619 species have some or all of their habitat on these lands. Governmental entities (state, county, and/or city governments) are the owners of habitat for 516 listed species. Other owners of lands containing habitat for listed species include utilities, water districts, port districts, airports, and universities.

Nonfederal landowners have a major stake in the designation of land as critical habitat for listed species. At the

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[1] This section allows a normally prohibited action to proceed if an exemption is obtained from the Endangered Species Committee. 16 U.S.C. § 1536(o). The exemption is seldom given.

time of the GAO report, 80 of the 105 species for which critical habitat had already been designated had a portion of that critical habitat on nonfederal lands. More than half of those, or 43 species, had over 80% of their critical habitat on nonfederal lands. GAO report at 6; *see* 50 C.F.R. § 17.95 (listing of current critical habitat designations). With over 675 critical habitat designations yet to be made and over 6.9 million acres designated just for one species, the Northern Spotted Owl, it can be readily seen that there are many acres of private land that will be affected by future designations and that is only the beginning. As of the fall of 1994, 895 species had been listed and there were nearly 4,000 proposed or candidate species. NWI Resource, Vol. 5, Issue 1, Fall 1994, *Endangered Species Blueprint* at 20. Extrapolating from the GAO Report's findings to these additional species presents a staggering picture of the many millions of acres of private land that have the potential to be designated critical habitat.

Congress has required the Secretary of Interior when designating critical habitat to consider *any and all relevant* impacts of specifying any particular area as critical habitat. 16 U.S.C. § 1533(6). NEPA has the institutional mechanics to generate information on all the relevant impacts of proposed critical habitat designations needed for the Secretary to make an informed decision. But the Secretary of Interior has refused to employ this tool. This question of NEPA application is truly an important issue of national significance affecting citizens of every state in this Nation.[2] It needs to be addressed now to establish national uniformity.

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[2] Every single state in the Nation contains listed species in addition to species considered candidates for listing. *Endangered Species Blueprint* at 21.

II
THE NINTH CIRCUIT'S RULING THAT ESA PROCEDURES IMPLICITLY DISPLACE NEPA PROCEDURES CONFLICTS WITH NUMEROUS OTHER CIRCUITS WHICH HAVE FOLLOWED SUPREME COURT PRECEDENT

The Court should grant certiorari because the Ninth Circuit's decision is in stark conflict with six other circuits[3] that have followed this Court's ruling in *Flint Ridge*, 426 U.S. at 787-88. In *Flint Ridge*, this Court addressed whether the Department of Housing and Urban Development had to file an environmental impact statement (EIS) before allowing a private developer's financial disclosure letter to become effective. In addressing this question, this Court recounted the purpose of NEPA. It stated:

> NEPA's instruction that all federal agencies comply with the impact statement requirement--and with all the other requirements of § 102--"to the fullest extent possible," 42 U.S.C. § 4332, is neither accidental nor hyperbolic. Rather the phrase is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle. This conclusion emerges clearly from the statement of the Senate and House conferees who wrote "fullest extent possible" language into NEPA.
>
> "The purpose of the new language is to make it clear that each agency of the Federal Government ***shall*** comply with the directives set out in [§ 102(2)] ***unless*** the existing law applicable to such agencies' operations expressly

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[3] *See* Petition for Writ of Certiorari (Petition) at 9-11.

> prohibits or makes full compliance with one of the directives impossible."

Flint Ridge, 426 U.S. at 788-89 (emphasis and brackets in original).

This Court continued to quote the conferees stating:

> the Federal Government shall comply with the directives set out in said section "to the fullest extent possible" under their statutory authorizations and that no agency shall utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance. 115 Cong. Rec. 39703 (1969) (House Conferees).

Id. at 788.

This Court also concluded that, as serious as the mandate of NEPA was, it nevertheless was not intended to repeal by implication any other statute and, therefore, if requiring compliance with NEPA through the preparation of an environmental document would create a clear and unavoidable conflict with other statutory mandates, NEPA must give way. *Id.*

In this case, NEPA's environmental impact assessment requirement creates no clear and unavoidable conflict with the statutory requirements for designating critical habitat. In fact, the Ninth Circuit's decision does not even dispute that there is no "irreconcilable and fundamental conflict" with the Secretary's duties under ESA but rather found that the Circuit had never ruled that finding an irreconcilable conflict is the only way to avoid the requirements of NEPA. App. at 21a. Instead, the court ruled the language and legislative history of ESA implied that Congress intended NEPA not to apply when designating critical habitat. This creative position, however, is in direct conflict with this Court's ruling in *Flint Ridge* which specifically stated that the

question to be resolved in determining if NEPA applied was whether an ***irreconcilable and fundamental conflict*** existed. This basic standard of NEPA compliance, having been clearly articulated by this Court and followed by six other circuits, is now spurned by the Ninth Circuit Court of Appeals. This creates a major conflict that needs to be resolved by this Court.

III

THE NINTH CIRCUIT'S "DISPLACEMENT" DOCTRINE FOR EXEMPTING CRITICAL HABITAT DESIGNATION FROM NEPA COMPLIANCE IS IN CONFLICT WITH CONGRESSIONAL INTENT

Petitioner has pointed out with particular clarity that the Ninth Circuit's decision creating a new displacement exemption to NEPA is wrong. Petition at 13-19. First the Ninth Circuit relied on *Merrill v. Thomas*, 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), to support its displacement theory, yet *Merrill* actually follows *Flint Ridge* in significant degree. *Flint Ridge* involved mandatory deadlines imposed by the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, *et seq.* The Act requires private real estate developers involved in the interstate sales of unimproved land to file with the Department of Housing and Urban Development (HUD) disclosure statements containing information needed to protect prospective purchasers. The disclosure statement is automatically effective 30 days after filing at which time sales can then take place. This Court found that HUD could not prepare an EIS and still meet the requirement that disclosure statements go into effect within 30 days of filing. The deadlines under the Act were so short that NEPA's environmental assessment process with public comments and responses could not be complied with in time. Thus, an irreconcilable conflict existed negating the NEPA requirement.

In *Merrill*, Congress established pesticide registration procedures under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136, *et seq*. The FIFRA registration process called for expeditious action and Congress expected registration decisions within three months of receiving applications. *Merrill*, 807 F.2d at 778. The Ninth Circuit realized that, like the disclosure requirements in *Flint Ridge*, these pesticide registration deadlines also did not allow enough time for NEPA compliance. *Id.* at 777-81.

The Ninth Circuit also found an unmistakable congressional intent that NEPA and its time-consuming procedures ***did not*** apply because post-1972 FIFRA amendments altered registration requirements in order to greatly speed up a process that had been virtually ground to a halt by litigation. *Id.* at 780.

The Ninth Circuit found no comparable time conflicts in the instant case but instead shoehorned *Douglas County*'s facts into *Merrill's* congressional intent analysis. The 1978 ESA amendments expanded public notice and hearing requirements for critical habitat designations. The court found that these amendments indicated Congress' belief that not only the public participation requirements but all aspects of NEPA were therefore "superfluous" to the critical habitat designation process. App. at 17a. The court creatively ruled that ESA amendments designed to broaden the scope of considerations and flexibility in designating critical habitat were instead a narrow compromise that would be sabotaged by a requirement to comply with NEPA. App. at 18a. However, this finding makes no sense. NEPA can only serve to bolster flexibility in designating critical habitat as it would provide a much broader information base on which to make a decision and would provide enhanced public participation. *See, i.e., Trout Unlimited v. Martin*, 509 F.2d 1276, 1282 (9th Cir. 1974) (a principal purpose of NEPA is to inform Congress, the Executive, and the public about

environmental consequences of proposed actions). Moreover, ESA's legislative history, unlike FIFRA's, supports NEPA's applicability to critical habitat designation.

A. The 1978 Amendments to ESA Support NEPA's Applicability To Critical Habitat Designation

There is considerable legislative history that alone should have led the court to find that NEPA does indeed apply to critical habitat designation.

The 1973 Act "constructed a comprehensive means to balance economic growth and development with adequate conservation measures. ... Subsequent to its passage, the Act was amended in 1976, 1978 and 1979 to increase the flexibility in balancing species protection and conservation with development projects." H. Rep. No. 97-567 at 2809 (USCAN 1982). In 1978, Congress amended the ESA in a number of respects to restore balance to the statute. "Up until this time, the determination of critical habitat ha[d] been a purely biological question." H. Rep. No. 95-1625 at 9467 (USCAN 1978). The House Bill (H.R. 14104) changed that and directed the Secretary also to consider "economic and other relevant impacts" of the inclusion of specific areas as proposed critical habitat. H. Rep. No. 95-1625. The House Committee on Merchant Marines and Fisheries describes this expanded consideration requirement:

> With the addition of this new paragraph, the determination of critical habitat for invertebrates takes on significant added dimensions. *Economics and any other relevant impact* shall be considered by the Secretary in setting the limits of critical habitat per such a species. The Secretary is not required to give economics or any other "relevant impact" predominant consideration in his specification of critical habitat for invertebrates. Consideration and weight given to any particular

> impact is completely within the Secretary's discretion.
>
> ...
>
> The result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. The committee expects that in some situations the result in critical habitat will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified.

Id. at 9467 (emphasis added).[4]

These "factors of recognized or potential importance to human activities" were to be added to the menu of considerations for designating critical habitat giving the Secretary greater decisionmaking "flexibility." The Secretary thus was provided the responsibility to obtain all necessary relevant information to reach a balanced decision and thereby exclude acreage where "the benefits of exclusion outweigh the benefits of specifying the area as part of the critical habitat." Pub. L. No. 95-632, 92 Stat. 3766.

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[4] While the House Bill proposed expanding critical habitat consideration for invertebrate animal species, Senate Bill 2899 was passed in lieu of the House Bill after amending the Senate Bill language to include much of the text of the House Bill. In conference, the expanded critical habitat considerations of H.R. 14104 were extended to all listed species.

All necessary relevant information can only be generated by a process like that specified by NEPA which does not focus only on biological impacts of designation. For example, an illustrative checklist of environmental impact assessment considerations under NEPA would require the following areas to be considered: (A) Land Transportation and Construction; (B) Land Use; (C) Water Resources; (D) Air Quality; (E) Service Systems; (F) Biological Conditions; (G) Transportation Systems; (H) Noise and Vibration; (I) Aesthetics; (J) Community Structure; (K) Other. Daniel R. Mandelker, *NEPA Law and Litigation* 10-8 (Clark Broadman Callaghan, NY 1995). This kind of broad-based inquiry, generated by the NEPA process, would provide the Secretary just what is needed to reach an informed, flexible decision: all relevant information. An inquiry considering only biological and economic concerns is truncated and biased in favor of a decision that considers a few, rather than all, relevant factors. Thus, the inference that Congress intended the Secretary to comply with applicable information generating statutes like NEPA which are ***not*** in irreconcilable conflict with ESA is overwhelming. *See Robertson v. Methow Valley Citizens Counsel*, 490 U.S. at 350.

B. The 1982 Amendments to ESA Provide Even Greater Basis for Applying NEPA to Critical Habitat Designation

Legislative activity in 1982 gives even more support to petitioner's argument that NEPA should apply to critical habitat designations. Following the 1978 amendments, Congress continued to refine and clarify ESA. Of particular relevance to NEPA's application to certain ESA activities was H.R. 6133 (Pub. L. No. 97-304) and its specification that the Secretary must "base his determinations regarding the listing or delisting of species 'solely' on the basis of the best scientific and commercial data available." H. Rep. No. 97-567 at 2820 (USCAN 1982). The committee explained why this clarification had occurred:

> The addition of the word "solely" is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of species and intends that the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act not apply. The Committee notes, and specifically rejects, the characterization of this language of the Department of the Interior as maintaining the status quo and continuing to allow the Secretary to apply Executive Order 12291 and other statutes in ***evaluating alternatives*** to listing.[5]

Id. (emphasis added).

The committee took an altogether different position regarding relevant considerations for the designation of critical habitat.

> The Committee notes, however, that the provisions of the Act relating to the designation of critical habitat remain unchanged by H.R. 6133 and the economic analysis provisions of Section 4(b)(4) and provisions of Executive Order 12291 and the aforementioned statutes relating to the analysis of regulations would continue to apply to the designation of critical habitat.

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[5] In 1981, the Sixth Circuit Court of Appeals decided *Pacific Legal Foundation v. Andrus*, 657 F.2d 829. The court found that ESA limited listing decisions to biological criteria and precluded consideration of any other factor, therefore, making an EIS unnecessary. It appears that in 1982 Congress decided to codify this decision.

Id. at 2820-21. The meaning could scarcely be clearer. While listing decisions are to be based only on biology, critical habitat decisions are to be based on much broader considerations. Specifically, the information gathering and analytical provisions of various other statutes are to be complied with in evaluating alternatives to a proposed critical habitat designation. Evaluation of alternatives is, of course, at the heart of NEPA and the EA/EIS process. *See* 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.4, 1502.14.

The court, in *PLF v. Andrus*, emphasized that the primary purpose of NEPA is to ensure an informed decision by the agency contemplating federal action. 657 F.2d at 838. But, "if the agency cannot consider the environmental impact [of an agency action], an impact statement is useless to the agency in evaluating its action. ... [It] is not necessary to evaluate the priority the Secretary is to give to listing species as Congress has already done it." *Id.* at 838. But, that is not the case here. The agency can and must consider the total environmental impact of its designation decision. Without NEPA compliance, environmental impacts beyond those related to the listed species will be unknown. As stated by the District Court, "[e]ven if the purpose of the agency or the agency action (designating critical habitat in this case) is to enhance the environment or maintain the status quo, the environmental consequences of a particular agency action cannot be determined absent an environmental assessment." App at 50a-51a.

The petitioner in this action has asked for nothing more than the assurance that, when designating critical habitat, the FWS will make an informed decision. Unlike with the listing of a species, FWS can consider all environmental impacts and any other relevant considerations including economic impact. As the House Report of 1978 amendments indicated, "factors of recognized or potential importance to human activities in an area will be considered by the

Secretary in deciding whether or not all or part of that area should be included in the critical habitat." An EIS is critical to the consideration.

In response to this argument, the Ninth Circuit took the curious position that the ESA process for designating critical habitat furthers the goals of NEPA without requiring an EIS. App. at 25a. Such a finding establishes a dangerous precedent, however, as it acts to exalt biological concerns over all other factors, including environmental concerns, when designating critical habitat. But, what are the cumulative environmental effects of designation? What alternative designations are available that would still protect habitat but have less negative impacts on the human condition? Without NEPA compliance, this type of information will never be known.

Congress established NEPA to ensure that federal agencies make environmentally informed decisions. 42 U.S.C. § 4332(2)(A). In its ESA amendments of 1978 and 1982, Congress underscored that, when designating critical habitat, the Secretary of Interior was to make informed decisions by evaluating not just biological data but all other relevant data. 16 U.S.C. § 1533(b)(3).

However, by negating the application of NEPA herein, the Ninth Circuit assured that the Secretary will never have all of the necessary data. Despite the fact that the District Court found in its decision that the "defendant's designation of critical habitat will profoundly affect the quality of life in Douglas County," App. at 39a, and that the county's own lands adjacent to the proposed critical habitat could be significantly affected by the government "failing to properly manage for insect and disease control, and fire," the Ninth Circuit nevertheless found that Congress did not give "the Secretary the discretion to consider environmental factors, other than those related directly to the preservation of the

species" when designating critical habitat.[6] App. at 26a. The court found that the Secretary "cannot engage in the very broad analysis NEPA requires when designating a critical habitat under the ESA." *Id.* This conclusion simply cannot be found in the express language of ESA, in the legislative history of ESA, in the purposes of NEPA, or in the case law history of this Court.

CONCLUSION

This case is extremely important. The lower court's ruling establishes radical new precedent allowing the federal government to ignore the requirements of NEPA in situations where that law would provide the regulators with crucial information--information that Congress intended to be taken into account before reaching a decision. This case needs to be addressed so this Court can reestablish Congress'

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[6] One commentator criticized the federal government's failure to adhere to NEPA stating:

> The FWS needs to promulgate rules on ... critical habitat designation procedures so that methods for incorporating economic and social information and balancing mechanisms can be clearly set out. One way to accomplish this is to follow the procedures specified in the National Environmental Policy Act. The Service has been very disingenuous in stating that listing, designation of critical habitat, and the preparation of recovery plans in the endangered species program do not have major effects on the natural and human environment. While they may not in every--or even most--cases, the mechanisms under the NEPA process are set up to deal with this issue.

Souder at 1138.

constitutional authority to determine when a statute's provisions apply and when they do not.

The petition for certiorari should be granted.

DATED: October, 1995.

Respectfully submitted,

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No. 95-371

In The

Supreme Court of the United States

October Term, 1995

DOUGLAS COUNTY, OREGON,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, HEADWATERS, INC. AND UMPQUA VALLEY AUDUBON SOCIETY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Did the court of appeals correctly conclude that the unique and comprehensive statutory procedures for designating critical habitat to protect a threatened species under the Endangered Species Act ("ESA") supplant the requirement to also prepare an environmental impact statement ("EIS") under the National Environmental Policy Act ("NEPA") for the habitat designation?

2. Did the court of appeals correctly conclude, consistent with this Court's decisions interpreting NEPA, that the statute's command to prepare an EIS for major federal actions that "significantly affect the quality of the human environment," 42 U.S.C. § 4332(2)(C), does not apply to actions that do not cause any "change in the physical environment," *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)?

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should deny Douglas County's petition for a writ of certiorari because the ninth circuit decided the case below on two alternate grounds, neither of which conflicts with the decisions of this Court or any court of appeals.

The court of appeals' primary reason for concluding that an EIS is not required for the designation of critical habitat under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, – that the procedures for designating critical habitat under the ESA supplant those of NEPA – does not conflict with the Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976), or the decision of any court of appeals. It also does not break any new ground under either NEPA or the ESA.

The court of appeals' alternate ground for decision – that the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, does not apply to actions that leave the natural environment unchanged – does not involve any implied exemption from NEPA as petitioners assert. Instead, the decision is consistent with the express language of the statute and the decision of this Court in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983).

STATEMENT OF THE CASE

This case involves an ironic and misguided effort by Douglas County, Oregon, to compel the preparation of an

EIS to accompany the government's designation under the Endangered Species Act of critical habitat on federal lands to protect the threatened northern spotted owl.

Douglas County's effort is ironic because its primary concern with the designation of critical habitat for the owl is not protection of the environment from significant adverse impacts at all but protection of County revenue derived from logging of federal timber lands. As explained succinctly in the declaration of Douglas Robertson, Chairman of the Douglas County Board of Commissioners:

> I have reviewed the proposed rule known as "Endangered and Threatened Wildlife and Plants; Revised Proposed Determination of Critical Habitat for the Northern Spotted Owl; Proposed Rule" dated August 13, 1991. As part of this proposed rule the [U.S.] Fish and Wildlife Service has estimated that the designation of critical habitat in Douglas County will result in an 82% decrease in the harvest level on the lands managed by the Roseburg Bureau of Land Management and a 43% decrease in harvest on lands managed by the Umpqua National Forest. *Since the receipts from the timber harvests on these two land management units represent the majority of the operating funds received by Douglas County the reduction in harvest level will adversely affect the social and economic well being of the county.*

Declaration of Douglas Robertson at 3-4 (D.Ct. Docket No. 17) (emphasis added). For this reason, the court of appeals, in rejecting Douglas County's attempt to compel preparation of an EIS, observed, "[w]e are reluctant, . . . to make NEPA more of an 'obstructionist tactic'

to prevent environmental protection than it may already have become." Petition for a Writ of Certiorari (hereinafter "Pet."), Appendix A at 28a (citing and quoting *Pacific Legal Foundation v. Andrus*, 657 F.2d 829, 838 (6th Cir. 1981)).

Douglas County's effort to compel preparation of an EIS is misguided because the economic concerns that underlie its effort have been addressed fully by the defendants, Secretary Babbitt and the U.S. Fish and Wildlife Service ("FWS"), in preparing their designation of critical habitat for the spotted owl. As the district court observed in dismissing Douglas County's claim under the ESA that the economic effects of the critical habitat designation had not been addressed:

> The record reflects that FWS prepared an analysis of the economic impacts of [the critical habitat] designation for publication in conjunction with the proposed rule prior to each proposed designation. . . . FWS reviewed county level economic impacts and revenue sharing impacts with calculations of the employment and revenue losses. FWS also developed and implemented a four step process to examine whether any critical habitat area should be excluded because the benefits of exclusion outweighed the benefits of inclusion. . . .
>
> With regard to each impacted county, FWS considered the economic impacts, anticipated future harvest, owl factors, and other benefits and proposed a decision on exclusion. . . .
>
> In summary, the administrative record in this case reveals that FWS adequately considered relevant economic issues associated with

> critical habitat designation and particularly those of employment and revenue loss due to decreased federal timber sales. Plaintiff was afforded an opportunity to respond to both FWS's economic analysis and FWS's balancing process.
>
> Based on the foregoing, I find that FWS took a "hard look" at the impacts question[,] . . . and conducted a "reasonably thorough discussion" of the effects at issue.

Pet., App. B at 35a-36a (citations omitted).

Under these circumstances, it appears that Douglas County's pursuit of its claim under NEPA, and its petition to this Court, are not prompted by any genuine concern for protection of the environment, or by a concern about the absence of a forum for expressing their views to the government. Instead, the County appears to be moved solely by dissatisfaction with the ultimate designation of critical habitat for the northern spotted owl and the desire to delay that designation.

THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *FLINT RIDGE* OR THE DECISION OF ANY COURT OF APPEALS.

A. The Court's *Flint Ridge* Decision Does Not Address The Question Presented And Decided In This Case.

Petitioners assert that the court of appeals' decision in this case conflicts with the Court's decision in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976), and the decisions of six other circuits that have followed *Flint Ridge*. Pet. at 7-13. Petitioners are wrong. *Flint Ridge* and the decisions that follow it, including decisions of the ninth circuit, *see, e.g., Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986), simply address a different NEPA question than the issue raised and decided here.

In *Flint Ridge*, the question resolved was whether NEPA must give way, in the presence of a direct and irreconcilable conflict between NEPA and another statute that would prevent any compliance with NEPA. 426 U.S. at 788-89.[1] The Court, of course, concluded that under such circumstances, "NEPA's impact statement requirement is inapplicable." *Id.* at 792. Both before and after the

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[1] In *Flint Ridge*, the Court assumed, without deciding, that NEPA would actually apply to the challenged actions. 426 U.S. at 788-89 ("And so the question we must resolve is whether, *assuming* an environmental impact statement would otherwise be required in this case, requiring the Secretary to prepare [an EIS] would create an irreconcilable and fundamental conflict. . . . " (emphasis added)).

Court's *Flint Ridge* decision, however, the courts of appeal have recognized, in a scattered handful of cases, unique circumstances where the procedures required by NEPA (on the one hand) and the requirements of another statute (on the other) overlap to such an extent that compliance with NEPA would be redundant, contrary to the intent of Congress, or would frustrate the purposes of both NEPA and the other statute. *See, e.g., State of Alabama ex rel. Siegelman v. Environmental Protection Agency*, 911 F.2d 499 (11th Cir. 1990) (no EIS required for certain EPA actions under the Resource Conservation and Recovery Act); *Merrell v. Thomas*, 807 F.2d 776 (9th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987) (no EIS required for certain actions under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA")); *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981) (no EIS required for decision to list a species under the Endangered Species Act); *Environmental Defense Fund v. Environmental Protection Agency*, 489 F.2d 1247 (D.C. Cir. 1973) (no EIS required for certain actions under FIFRA); *Getty Oil Co. v. Ruckelshaus*, 467 F.2d 349 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973) (no EIS required for certain actions under the Clean Air Act); *see also Warren County v. North Carolina*, 528 F.Supp. 276 (E.D.N.C. 1981) (no EIS required for an action under the Toxic Substances Control Act); *Chesapeake Bay Foundation v. Virginia Water Control Board*, 453 F.Supp. 122 (E.D. Va. 1978) (same, Federal Water Pollution Control Act). In each of these cases, which turn on their individual facts and circumstances, the courts have not required compliance with NEPA even though they did not find a direct and irreconcilable statutory conflict that barred NEPA compliance as in *Flint Ridge*. This case too is

but another in the handful of NEPA cases that *Flint Ridge* does not address. In short, the fundamental premise of petitioner's argument on the first question presented – that an irreconcilable statutory conflict is "the *only* basis for avoiding NEPA compliance," Pet. at 12 (emphasis in original) – is not supported by the case law.[2]

B. The Court Of Appeals' Decision In This Case Is Consistent With Other Cases Where The Courts Of Appeal Have Found Strict NEPA Compliance Unnecessary.

The court of appeals' decision in this case falls within a small – but well recognized – category of cases noted above where compliance with NEPA has not been required. As the court of appeals explained:

> In *Merrell v. Thomas*, 807 F.2d at 778, we found that NEPA did not apply when the EPA registered pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and concluded that because Congress created two different mechanisms in FIFRA and NEPA, and because Congress declined the opportunity to apply NEPA to FIFRA, that it intended that

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[2] Indeed, in several of the court of appeals' decisions that petitioners cite as conflicting with the ninth circuit decision in this case, the courts recognized that this Court's decision in *Flint Ridge* does not describe the only situation that may render NEPA inapplicable. *See, e.g., Limerick Ecology Action v. U.S. Nuclear Regulatory Comm'n*, 869 F.2d 719, 729 & n. 7 (3d Cir. 1989) (citing and discussing cases that find NEPA inapplicable even in the absence of a direct and irreconcilable statutory conflict) (cited in Petition at 11).

> FIFRA procedures replace NEPA for pesticide registration.
>
> . . .
>
> The legislative history of the ESA at issue in the instant case follows a similar pattern and convinces us that Congress intended that the ESA procedures for designating a critical habitat replace the NEPA requirements.

Pet., App. A at 15a-16a.[3] Because petitioners cannot argue that the court of appeals' decision in *Merrell* – or the group of cases to which it belongs – are wrong and warrant this Court's review, they attempt to distinguish this case from *Merrell*. Pet. at 13-19. This effort is flawed.

First, petitioners assert that "*Merrell* is inapplicable here because the court of appeals acknowledged in this case that 'time constraints alone would not prevent the Secretary from preparing an EIS.' " Pet. at 14. Petitioner's focus on time constraints, however, perpetuates their incorrect assumption that the outcome of this case is controlled by *Flint Ridge* and therefore conflicting statutory timelines are necessary to render NEPA inapplicable. Yet as *Merrell* itself makes clear, a comparison of statutory structure, including statutory timelines, is only one element in determining whether NEPA applies in the face of a separate but comprehensive statutory scheme that also

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[3] The court in *Merrell* cited several of the cases where courts have found NEPA procedures replaced by the provisions of other statutes, including cases cited *supra* at 6. *See* 807 F.2d at 781. While the court acknowledged that its decision was consistent with these earlier rulings, it found no need to articulate a single principle to encompass all of these decisions. *Id.*

fully addresses environmental impacts. 807 F.2d at 778-81 (reviewing a number of additional factors).

Second, petitioners assert that *Merrell* is inapplicable in this case because the legislative history of FIFRA that was at issue in *Merrell* is significantly different from the history of the ESA. Pet. at 17-19. This quibble with the court of appeals' application of an uncontroversial legal principle is not the kind of important legal issue that warrants the Court's review. Moreover, the court of appeals carefully considered Douglas County's arguments regarding legislative history, Pet., App. A at 20a-21a, and rejected them because it found that, as in *Merrell*, other aspects of the ESA's legislative history provided persuasive evidence that Congress did not intend NEPA procedures to apply to the designation of critical habitat. *Id.* at 16a-20a.[4] Petitioners simply fail to identify any meaningful distinction between this case and *Merrell*.[5] And they do not and cannot argue that *Merrell*

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[4] Petitioners also criticize the court of appeals for concluding that Congress had approved the agency practice of not following NEPA procedures in designating critical habitat. Pet. at 19. Again, however, petitioner ignores the primary legislative analysis of the court of appeals which focuses on passage of the ESA amendments that established the procedures for designating critical habitat. Pet., App. A at 16a-18a.

[5] Petitioners also argue that the court of appeals incorrectly followed the Sixth Circuit's analysis in *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981). *See* Pet. at 15-17. Here too, petitioners are wrong. *Pacific Legal Foundation*, like *Merrell* and the other cases cited *supra* at 6, recognizes that in a number of unusual and limited circumstances, NEPA procedures may give way to other complex statutory schemes, even in the absence of an irreconcilable conflict. The factors the court of appeals considered in *Pacific Legal Foundation* are among the factors the

presents a significant, or controversial legal issue that would require this Court's intervention.[6]

Because the court of appeals' decision in this case is grounded in a small but recognizable area of NEPA jurisprudence, because the decisions in this area do not conflict with the decision of this Court in *Flint Ridge* or with the decisions of other courts of appeal, and because the petition does not otherwise present any significant legal issue requiring this Court's intervention, the Court should deny the petition.

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courts have considered in other similar cases. *Compare Pacific Legal Foundation*, 657 F.2d at 835-41, *with Alabama ex rel. Siegelman v. EPA*, 911 F.2d at 504-505. These are also among the factors the court of appeals considered and applied here, *see* Pet., App. A at 15a-21a. Contrary to petitioner's argument, these factors are neither irrelevant nor wrong. Pet. at 16.

[6] Petitioner's citation of *Catron County v. Fish and Wildlife Service*, No. 93-730-HB (D.N.M. slip op. Oct. 13, 1994), does not affect this conclusion since the district court in *Catron County* faced the same issue raised in this case – whether NEPA applies to the designation of critical habitat under the ESA – and simply adopted the analysis of the district court here to resolve that question. At the time of the district court ruling in *Catron County*, however, the court of appeals had not issued its ruling in this case. The court of appeals, of course, properly rejected the district court's analysis in this case and the Tenth Circuit may be expected to do the same when it considers *Catron County*. In any event, until the Tenth Circuit reaches a different result, there is no conflict among the circuits nor has petitioner identified any cases on this issue, other than *Catron County*, making their way through the federal courts.

II. THE COURT OF APPEALS' DISCUSSION OF WHEN AN EIS IS NOT REQUIRED IS CONSISTENT WITH THE EXPRESS LANGUAGE OF NEPA AND THIS COURT'S DECISION IN *METROPOLITAN EDISON.*

In addressing the second question presented, petitioner asserts that the court of appeals' decision not to require preparation of an EIS to accompany the designation of critical habitat for the northern spotted owl is based on an improperly "implied exemption" from NEPA. Pet. at 20-23.[7] Petitioner is wrong. The court of appeals' discussion of this issue, *see* Pet., App. A at 21a-24a, is consistent with the express language of NEPA and this Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983). Accordingly, it does not warrant review by this Court.

By its terms, NEPA applies to those "major federal actions" that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). In *Metropolitan Edison*, this Court concluded that NEPA's language requiring a detailed environmental analysis is inextricably predicated upon some "change in the physical environment." 460 U.S. at 774. Other courts have reached similar conclusions:

> [T]he Secretary's implementation of the [Boundary Waters Canoe Area] Act enables no person

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[7] If the Court declines to hear the first question presented in Douglas County's petition (as it should), it need not reach the second question presented because it addresses only an alternate holding or *dicta* in the court of appeals' decision in any event.

> to significantly affect the Wilderness. In fact, plaintiffs' major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness to many, thus not enabling these persons to motorboat and snowmobile throughout the Wilderness. *In essence, plaintiffs' claim is that the Department of Agriculture must prepare an EIS in order to leave nature alone.* The Court is not moved by this argument.

National Association of Property Owners v. United States, 499 F.Supp. 1223, 1265 (D.Minn. 1980), *aff'd*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982) (emphasis added); *see also Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669 (5th Cir. 1992), *cert. denied sub nom, Texas Water Conservation Ass'n v. Dept. of Interior*, ___ U.S. ___, 113 S.Ct. 75 (1992) (no EIS required for acquisition of conservation easement); *Como-Falcon Community Coalition v. U.S. Dept. of Labor*, 609 F.2d 342, 345-46 (8th Cir. 1979), *cert. denied*, 446 U.S. 936 (1980) (establishment of jobs corps center on existing college campus does not affect natural environment and does not require an EIS); *Breckenridge v. Rumsfeld*, 537 F.2d 864, 865-67 (6th Cir. 1976), *cert. denied*, 429 U.S. 1061 (1977) (closure of military base does not require EIS where no primary impact on the physical environment will occur); *Sierra Club v. Marsh*, 692 F.Supp. 1210 (S.D. Cal. 1988), *aff'd on other grounds*, 816 F.2d 1376 (9th Cir. 1987) (no EIS required for transfer of mitigation lands to wildlife refuge as part of settlement). None of these cases involves an "implied exemption" from NEPA.[8]

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[8] Petitioner also argues that the court of appeals must have misinterpreted NEPA because they find the lower court's

The decision in this case is fully consistent with these rulings, this Court's opinion in *Metropolitan Edison*, and the express language of NEPA. The designation of critical habitat under the ESA creates no perceptible impact on the physical environment – it causes no consumptive use of the forests, leads to no deterioration or degradation of physical resources, and neither disturbs nor alters the existing environment. Thus, it is indistinguishable from the conservation easement at issue in *Sabine River*, *supra*, or the transfer of mitigation lands in *Sierra Club v. Marsh*, *supra*. Rather than directly or indirectly causing a change in the physical environment, which *Metropolitan Edison* indicates is a triggering factor for preparation of an EIS, designation of critical habitat leaves the environment alone.

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decision internally inconsistent. According to petitioner, the court could not properly conclude (on the one hand) that petitioner had established sufficient injury-in-fact for standing and then find (on the other hand) that the challenged action would not cause sufficient environmental impacts to trigger NEPA. Pet. at 21.

Petitioner's argument incorrectly confuses the standing injury-in-fact inquiry with the merits of the case. Petitioner's contention would require that every plaintiff who has standing to bring a NEPA case necessarily will win a claim that the challenged action requires preparation of an EIS. Obviously, this is not so. In each of the cases cited in the text, for example, the plaintiffs presumably had suffered an injury-in-fact sufficient to establish their standing (e.g., the plaintiffs in *Sabine River* undoubtedly were injured in fact because they would not be able to build a reservoir on the land subject to the conservation easement) but they still were not entitled to relief on their claim under NEPA. Moreover, petitioner's economic injury in this case is not within the zone of environmental interests that NEPA is designed to protect.

Petitioner seeks to avoid this conclusion by pointing out that nature itself changes the physical environment. Pet. at 21. This argument, however, converts any decision not to act – any decision to leave the environment alone and allow natural processes to unfold – into a major federal action requiring an EIS. The fact that the designation of critical habitat "allow[s] more areas to acquire old-growth characteristics," Pet., App. B at 55a, is nothing but an attempt to mask the fact that the federal government is doing *nothing at all* on lands designated as critical habitat under the ESA. The rule designating critical habitat does not *use* the property, but instead leaves it in its natural state and allows natural processes to occur. In short, petitioners are wrong when they assert that the decision to designate critical habitat for a threatened species triggers NEPA procedures.[9]

Contrary to petitioner's claim, the court of appeals did not base its decision in this case on an improper "implied exemption" from NEPA. The second question presented does not warrant this Court's review.

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[9] Petitioner argues that the decision in the *Sabine River* case supports their position because there the government prepared an environmental assessment (EA) before concluding that it did not need to prepare an EIS. Pet. at 22. The issue in this case, of course, is whether the government is *required* to follow NEPA for the designation of critical habitat and prepare either an EA or an EIS. The fact that the government may have *chosen* to prepare an EA in some other case where it may not have needed to is simply not probative of the issue here.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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No. 95-371

In the Supreme Court of the United States

OCTOBER TERM, 1995

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, applies to a federal agency's determination of the critical habitat for a threatened or endangered species under the Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-371

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 48 F.3d 1495. The opinion of the district court (Pet. App. 29a-58a) is reported at 810 F. Supp. 1470.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1995. A petition for rehearing was denied on June 5, 1995. Pet. App. 59a-60a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenged the decision of the Secretary of the Interior—acting through the Fish and Wildlife Service (FWS) and pursuant to the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*—to designate approximately 6.8 million acres of federal land as critical habitat for the northern spotted owl, which the Secretary had previously determined was a threatened species for purposes of the ESA. The district court set aside the designation, holding that, in designating the owl's critical habitat, the FWS was required to, but did not, comply with the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. 42a-56a. The court of appeals reversed, holding that NEPA's requirements do not apply to designations of critical habitat under the ESA. *Id.* at 13a-27a.

1. a. Under Section 4 of the ESA, when the Secretary[1] lists a species as threatened or endangered, he generally must, at the same time, designate the species' critical habitat. ESA § 4(a)(3), 16 U.S.C. 1533(a)(3).[2] If the critical habitat is not "determinable" at the time of listing, however, the Secretary

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[1] The term "Secretary" means the Secretary of the Interior or the Secretary of Commerce, depending upon the wildlife species involved. ESA § 3(15), 16 U.S.C. 1532(15). Hereinafter, we use the term to refer to the Secretary of the Interior, as he was responsible for the species at issue here.

[2] The ESA defines critical habitat in part as "specific areas * * * on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. 1532(5)(A)(i).

may take up to an additional year to make the designation. 16 U.S.C. 1533(b)(6)(C)(ii).

The ESA provides that, in determining critical habitat, the Secretary must rely on the "best scientific data available" and take into "consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. 1533(b)(2). The ESA further requires the Secretary to designate an area as critical habitat if he "determines * * * that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2).

The ESA also places detailed procedural obligations on the Secretary when designating critical habitat. He must publish notice of the proposed designation in the *Federal Register*; give actual notice of the proposal to, and invite comments from, each State and county in which the species is believed to occur; publish a summary of the proposal in local newspapers; and hold a public hearing on the proposal if anyone requests one. 16 U.S.C. 1533(b)(5).

b. Section 102(C) of NEPA, 42 U.S.C. 4332(C), requires all federal agencies to

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Preparation of an environmental impact statement (EIS) serves two purposes:

> The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process.

Weinberger v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139, 143 (1981).

2. a. The Secretary decided to list the northern spotted owl as a threatened species in connection with litigation in the Western District of Washington. *Northern Spotted Owl* v. *Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988). When the Secretary announced his listing decision, he also announced that the critical habitat was not "determinable" on the basis of the information then available. 55 Fed. Reg. 26,114 (1990). In response to the latter announcement, the plaintiffs in *Northern Spotted Owl* v. *Hodel*, *supra*, obtained an order requiring the Secretary to publish a proposed critical habitat designation by April 29, 1991, and to issue the final designation at the "earliest possible

time under the appropriate circumstances." *Northern Spotted Owl* v. *Lujan*, 758 F. Supp. 621, 629-630 (W.D. Wash. 1991).

On May 6, 1991, the Secretary published a proposed regulation defining critical habitat for the northern spotted owl. 56 Fed. Reg. 20,816 (1991). He identified approximately 11.6 million acres of federal, state, and private lands as "proposed critical habitat." *Id.* at 20,820. The Secretary invited comments on the proposal and stated that he would revise it in light of those comments. *Id.* at 20,816.[3]

In the May 6, 1991, notice, the Secretary determined that it was not necessary to prepare an environmental assessment. 56 Fed. Reg. 20,824 (1991). He relied on a policy, first announced by the FWS in 1983, that determinations under Section 4 of the ESA are not subject to NEPA. In adopting that policy, the FWS had "accepted [the Council on Environmental Quality's] judgment that Section 4 listing actions are exempt from NEPA review 'as a matter of law.'" 48 Fed. Reg. 49,244 (1983). The FWS policy had also been based on the fact that all 130 environmental analyses prepared between 1973 and 1983 resulted in a decision not to prepare an EIS, and that the Sixth Circuit had held in *Pacific Legal Foundation* v. *Andrus*, 657 F.2d 829 (1981), that listing decisions under Section 4 of the ESA are not subject to NEPA. 48 Fed. Reg. 49,244-49,245 (1983).

b. On August 13, 1991, the Secretary published a revised proposed designation of critical habitat. 56

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[3] Subsequently, the Secretary held four public hearings and received approximately 16,400 written comments on the initial proposed critical habitat designation. 56 Fed. Reg. 40,020 (1991).

Fed. Reg. 40,002 (1991). The revised designation reduced the proposed critical habitat area to about 8.2 million acres by eliminating all privately owned land and most state-owned land. *Id.* at 40,011. The Secretary included in the revised proposal a summary of the comments and recommendations on the initial proposal. *Id.* at 40,020-40,033. The revised proposal again invited comments and announced that no environmental assessment would be prepared. 56 Fed. Reg. 40,034 (1991).[4]

c. On January 15, 1992, the Secretary issued his final designation of critical habitat. 57 Fed. Reg. 1,796 (1992). The Secretary reduced the area designated as critical habitat to less than 6.9 million acres of land, all of which was federal land. *Id.* at 1,810-1,811. The Secretary also provided an extensive explanation of the analysis underlying the designation. The explanation included discussions of the criteria for identifying critical habitat and the application of those criteria in this case (*id.* at 1,803-1,806); the possible economic impacts of the designation (*id.* at 1,814-1,821); and the effect of the designation on biodiversity and ecosystem protection (*id.* at 1826-1828). The final designation also responded in detail to the public comments. *Id.* at 1,828-1,833.

3. Petitioner brought this action to challenge the Secretary's designation of critical habitat for the northern spotted owl. Petitioner contended that, in preparing the designation, the FWS had failed to comply with NEPA and violated the ESA. On cross-

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[4] The revised proposal provided a 60-day public comment period, during which four more public hearings were held and about 15,800 additional written comments were received. 57 Fed. Reg. 1,828 (1992).

motions for summary judgment, the district court held that petitioner had standing to bring a NEPA challenge; that the FWS had not violated the ESA; and that the FWS was required to comply with NEPA and had failed to do so. Pet. App. 29a-58a.[5]

In rejecting petitioner's ESA claims, the district court held that the FWS "took a 'hard look'" at the "relevant economic issues associated with critical habitat designation" and sufficiently discussed those issues in its decision. Pet. App. 36a. The court also held that the FWS "consider[ed] whether the proposed designation of critical habitat would impact other species such as deer and elk and stated a rational basis for its conclusion that the critical habitat designation would not negatively impact those species." *Id.* at 35a.

In holding that NEPA applied to the designation of critical habitat, the district court rejected the Secretary's reliance on *Pacific Legal Foundation.* Pet. App. 45a-55a. The court believed that that case was distinguishable on the ground that it involved the Secretary's decision to list a species as threatened or endangered, rather than his decision to designate the species' critical habitat.

4. The court of appeals reversed in relevant part, holding that "Congress intended that the ESA procedures for designating a critical habitat replace

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[5] Having ruled for the government on the merits of petitioner's ESA claims, the district court found that it was "not necessary to address [the government's] argument that [petitioner] lack[ed] standing to pursue" those claims. Pet. App. 36a n.2.

the NEPA requirements." Pet. App. 16a.[6] The court determined that the "carefully crafted congressional mandate for public participation in the designation process * * * displaces NEPA's procedural and informational requirements." *Id.* at 17a. It also observed that "the ESA has an important mandate that distinguishes it from NEPA." *Id.* at 18a. The court explained that the ESA mandates the designation as critical habitat of "any area without which the species would become extinct." *Ibid.* (citing 16 U.S.C. 1533(b)(2)). In the court's view, "[t]his mandate conflicts with the requirements of NEPA because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions." Pet. App. 18a.

The court of appeals also discussed two rationales offered by intervenors. The court stated, first, that NEPA procedures do not apply to federal actions that "[p]reserve the [p]hysical [e]nvironment." Pet. App. 21a. Second, the court stated that "NEPA does not apply to the designation of a critical habitat because the ESA furthers the goals of NEPA without demanding an EIS." *Id.* at 25a.[7]

ARGUMENT

As the Ninth Circuit observed, the question whether NEPA applies to the designation of critical habitat under Section 4 of the ESA is one "of first

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[6] While reversing on the merits, the court of appeals affirmed the district court's determination that petitioner had standing to assert its NEPA claim. Pet. App. 8a-13a.

[7] The Secretary did not endorse those positions in the court of appeals, although the Secretary did argue below, as we do in this Court (see pages 11-14, *infra*), that actions that have no effect on the physical environment are not covered by NEPA.

impression." Pet. App. 13a. The Ninth Circuit's resolution of that question turned upon the specific provisions of the ESA governing critical habitat designations. See *id.* at 15a-27a. Contrary to petitioner's contention (Pet. 7-13), the Ninth Circuit's decision regarding the interaction of NEPA and Section 4 of the ESA is correct and does not conflict with *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n*, 426 U.S. 776 (1976), or decisions in other circuits, all of which concern the interaction of NEPA and a statute other than the ESA. Further review is therefore unwarranted.

In *Flint Ridge*, the Court addressed "whether [NEPA] require[d] the Department of Housing and Urban Development (HUD) to prepare an [EIS] before it [might] allow a disclosure statement filed with it by a private real estate developer pursuant to the Interstate Land Sales Full Disclosure Act (Disclosure Act) to become effective." 426 U.S. at 778. HUD argued that an EIS was not required for two reasons: (1) HUD's allowing a disclosure statement to become effective was not a "major federal action significantly affecting the quality of the human environment within the meaning of NEPA"; and (2) even if it was, "HUD [was] nonetheless exempt from the duty of preparing an [EIS] because compliance with that duty is not possible if HUD is also to comply with the Disclosure Act's requirement that statements of record [required as part of the disclosure statement] become effective within 30 days of filing, unless incomplete or inaccurate on their face." *Id.* at 786-787. The Court agreed with the second argument (and therefore found it unnecessary to address the first argument). *Id.* at 787. The Court determined that Section 102 of NEPA "recognizes

* * * that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way." *Flint Ridge*, 426 U.S. at 788. The Court discerned such a conflict between NEPA's EIS requirement and the Disclosure Act's 30-day effective-date requirement. The Court found it "inconceivable that an environmental impact statement could, in 30 days, be drafted, circulated, commented upon, and then reviewed and revised in light of the comments." *Id.* at 788-789. The Court rejected the argument that HUD could suspend the 30-day period pending the preparation of an EIS, "find[ing], to the contrary, that the Disclosure Act leaves the Secretary [of HUD] no such discretion." *Id.* at 789-790.

Relying upon *Flint Ridge*, the Ninth Circuit recognized in this case that NEPA's requirement that agencies comply with its terms "to the fullest extent possible" was "neither accidental nor hyperbolic." Pet. App. 14a (quoting *Flint Ridge*, 426 U.S. at 787). In keeping with this Court's analysis in *Flint Ridge*, the Ninth Circuit identified a "conflict" between NEPA's requirement that an EIS be prepared and the requirement of the ESA with regard to critical habitat designation. Specifically, the court of appeals held that the ESA requirement that the Secretary include as part of the designated critical habitat area, any "area without which the species would become extinct[,] * * * conflicts with the requirements of NEPA[,] because in cases where extinction is at issue, the Secretary has no discretion to consider the environmental impact of his or her actions." Pet. App. 18a. Petitioner does not challenge that understanding of the limits on the Secretary's discretion under the ESA. The court's analysis thus fully comports with that of *Flint Ridge*.

There is likewise no merit to petitioner's assertion (Pet. 12-13) that "[i]n the Ninth Circuit federal agencies are now free to assert NEPA exemptions in the absence of any irreconcilable conflict" with respect to "thousands of agency decisions" under statutes other than the ESA. The legal theory upon which the Secretary relied in the court of appeals, and upon which the Ninth Circuit based its decision in this case, has been extant since 1986, when the Ninth Circuit issued its decision in *Merrell* v. *Thomas*, 807 F.2d 776 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Since *Merrell*, until the decision in this case, the court of appeals has not found *Merrell* applicable to any other statutory scheme. The court of appeals decision here, as in *Merrell*, turns on the analysis of a particular statute and its legislative history. It offers no incentive to other agencies implementing different statutory schemes to seek to avoid compliance with NEPA. There is simply no basis, therefore, to claim that "thousands of agency decisions may now be vulnerable to NEPA avoidance."

For similar reasons, the decision below does not conflict with the decisions of other courts of appeals cited by petitioner (Pet. 9-11). Petitioner contends that those decisions required agencies to identify a "statutory conflict" in order to exempt certain agency actions from NEPA. Pet. 10. The Ninth Circuit found such a conflict in this case. Pet. App. 18a.

The court of appeals decisions cited by petitioner are also distinguishable because they concerned federal actions that had a direct and immediate impact on the physical environment. For example, *Calvert Cliffs' Coordinating Committee, Inc.* v. *United States Atomic Energy Comm'n*, 449 F.2d 1109 (D.C. Cir. 1971), involved the construction of nuclear power

plants. *Id.* at 1111-1112, 1115. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972), concerned the construction of a hydro-electric dam. *Id.* at 1169, 1176 (dictum).[8] There was accordingly no dispute in those cases as to the existence of a "[f]ederal action[] significantly affecting the quality of the human environment" within the meaning of NEPA, 42 U.S.C. 4332(C).

In contrast, the federal action at issue here did not have any direct and immediate impact on the physical environment. The only result of a designation of critical habitat is that federal agencies must consult with the FWS before starting a project in the critical habitat area.[9] The Ninth Circuit based its decision in part on the fact that the designation of critical habitat does not affect, but instead "[p]reserve[s] the [p]hysi-

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[8] See also *Limerick Ecology Action, Inc.* v. *NRC*, 869 F.2d 719, 729-731 (3d Cir. 1989) (grant of full power license for nuclear power plant); *Jones* v. *Gordon*, 792 F.2d 821, 823, 825-827 (9th Cir. 1986) (grant of incidental take permit under MMPA); *Public Service Co.* v. *NRC*, 582 F.2d 77, 81-86 (1st Cir.) (rerouting of high-capacity electric transmission lines), cert. denied, 439 U.S. 1046 (1978); *Texas Committee on Natural Resources* v. *Bergland*, 573 F.2d 201, 206-208 (5th Cir.) (timber harvesting on national forests lands), cert. denied, 439 U.S. 966 (1978); *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 820, 823 (D.C. Cir. 1977) (location of submarine base); *Louisiana* v. *Federal Power Comm'n*, 503 F.2d 844, 849, 874-875 (5th Cir. 1974) (plan to curtail natural gas deliveries); *Davis* v. *Morton*, 469 F.2d 593, 594, 598 (10th Cir. 1972) (federal approval of 99-year lease on Indian land).

[9] Of course, the agency that proposes the project must comply with NEPA and the ESA. For example, if the Bureau of Reclamation proposes to construct flood control facilities in an area designated as critical habitat, the Bureau's flood control project would be subject to NEPA, as well as to the ESA.

cal [e]nvironment." Pet. App. 21a. Because that fact was not present in the cases upon which petitioner relies, the conclusion in those cases that NEPA's requirements were applicable does not conflict with the Ninth Circuit's conclusion that NEPA's requirements were not applicable here.[10]

The Ninth Circuit's reliance on the lack of an effect on the physical environment is consistent with *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983). There, this Court held that NEPA did not require the Nuclear Regulatory Commission, in deciding whether to permit a nuclear power plant to resume operations, to consider the asserted psychological harms that a resumption of operations would have upon people who lived near the power plant. *Id.* at 772-779. In so holding, the Court emphasized NEPA's concern with impacts on the

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[10] Petitioner asserts (Pet. 12) that an exemption from NEPA can be found only if there is an irreconcilable statutory conflict, as in *Flint Ridge*. That assertion fails to recognize that not all federal actions are subject to NEPA in the first place. For example, in *Andrus* v. *Sierra Club*, 442 U.S. 347, 356-364 (1979), this Court held that NEPA did not apply to agency requests for appropriations without finding a clear and irreconcilable conflict. Moreover, lower courts have held that NEPA does not apply when the underlying agency process is the functional equivalent of the NEPA process. See, *e.g.*, *Anchorage* v. *United States*, 980 F.2d 1320, 1329 (9th Cir. 1992); *Alabama ex rel. Siegelman* v. *EPA*, 911 F.2d 499, 504 (11th Cir. 1990); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1051 (D.C. Cir. 1978); *Wyoming* v. *Hathaway*, 525 F.2d 66, 71-73 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976). Two of the decisions on which petitioner relies have recognized that an agency action may be exempt from the NEPA under the "functional equivalence" theory even in the absence of an irreconcilable statutory conflict. See *Limerick Ecology Action*, 869 F.2d at 729 n.7; *Texas Committee*, 573 F.2d at 207-208.

physical environment. The Court stated that the determination whether NEPA requires "consideration of a particular effect" depends upon "the relationship between that effect and the change in the physical environment caused by the major federal action at issue." *Id.* at 773. The Court found no such relationship in the case before it, because the asserted psychological harms were said to flow from residents' fear of a nuclear accident, and the "risk of an accident is not an effect on the physical environment" requiring analysis under NEPA. *Id.* at 775 (emphasis omitted).

Finally, petitioner errs in suggesting (Pet. 16-17) that NEPA provides the only vehicle for raising environmental concerns or presenting alternative configurations of critical habitat. Petitioner had an opportunity to do both under the procedures prescribed by the ESA. Thus, the ESA requires the Secretary to "give actual notice" of any proposed critical habitat designation "to each county * * * in which the species is believed to occur, and invite the comment of * * * each such jurisdiction." 16 U.S.C. 1533(b)(5)(A)(ii). A county may also request a public hearing. 16 U.S.C. 1533(b)(5)(E). If a county disagrees with the Secretary's final decision on the designation, it may seek judicial review of that decision under the ESA. 16 U.S.C. 1540(g). Petitioner sought such review by this action, and its ESA claims were considered by the district court (and rejected in rulings that are not at issue in this Court).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-371

In the Supreme Court of the United States

OCTOBER TERM, 1994

DOUGLAS COUNTY, OREGON, PETITIONER

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
HEADWATERS, INC. AND
UMPQUA VALLEY AUDUBON SOCIETY, RESPONDENTS

PETITIONER'S REPLY BRIEF

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In the Supreme Court of the United States

October Term, 1994

No. 95-371

Douglas County, Oregon, Petitioner

v.

Bruce Babbitt, Secretary of the Interior,
Headwaters, Inc. and
Umpqua Valley Audubon Society, Respondents

Petitioner Douglas County, Oregon respectfully submits this reply brief in support of its petition for a writ of certiorari.

STATUS OF RELATED LITIGATION

On November 13, 1995 the court of appeals for the Tenth Circuit heard oral argument in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, No. 94-2280, the appeal of a decision by the district court in New Mexico enjoining the FWS from designating critical habitat for two listed species in that state until it complies with NEPA.

A decision by the Tenth Circuit affirming the district court would create a direct conflict in the circuits on the

issue presented in Douglas County's petition. The Court may wish to consider holding Douglas County's petition until the Tenth Circuit rules in *Catron County*.

THE COURT OF APPEALS DECISION BELOW CONFLICTS WITH *FLINT RIDGE* AND OTHER CIRCUITS' DECISIONS, AND THE ISSUE IS IMPORTANT AND RECURRING

The court should grant Douglas County's petition. The court of appeals' decision below conflicts with decisions by this court and six courts of appeals on an important and recurring issue of national application. The *amicus* briefs of the National Association of Home Builders and the Pacific Legal Foundation demonstrate the national importance of the issue in this case.

Respondents concede that the Secretary of Interior never complies with NEPA on ESA critical habitat designations throughout the country, and that the decision below supports that national policy. Thus, the issue in this case is clearly national in scope, and has a high potential for recurring, as evidenced by the *Catron County* case in the Tenth Circuit.

Respondents also concede the court below excused the Secretary of the Interior from complying with NEPA for ESA critical habitat designations even though it found there is no "irreconcilable and fundamental conflict" between the two statutes. Respondents further concede that in *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma ("Flint Ridge")*, 426 U.S. 776, 787-88 (1976) this court required such "irreconcilable and fundamental conflict" to excuse NEPA compliance, and that other circuits have similarly

insisted on "irreconcilable and fundamental conflict" with another statute to excuse NEPA compliance.

Respondents point to no other case in the 25 year history of NEPA where a court has ever found that a statute contains an implied exemption from NEPA without such an "irreconcilable and fundamental conflict."[1]

Rather than dispute the applicability or validity of *Flint Ridge* and the courts of appeals decisions following it, respondents argue that the court of appeals' ruling here is consistent with *Flint Ridge*, and does not conflict with other courts of appeals. They can make this argument only by mischaracterizing the two key elements of the court of appeals' holding.

A. The court below excused NEPA compliance without finding any conflict between ESA and NEPA in this case.

The court below did not find that there was any "irreconcilable and fundamental conflict" between NEPA and ESA. Rather, it expressly ruled that such a conflict is not necessary to excuse NEPA compliance: "Douglas County argues that without this 'irreconcilable' statutory conflict, NEPA must apply. We disagree . . . ." Pet. App. 15a. It believed its prior decisions "do not state that the finding of irreconcilable conflict is the only way to avoid the NEPA provisions . . . ." App. 21a.

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[1] Respondents did not argue below, and do not claim here, that there is any "functional equivalence" between NEPA procedures and ESA critical habitat procedures which some courts in the early days of NEPA recognized as excusing NEPA compliance. *See* Pet. App. 19a n.10.

Respondents argue that the court of appeals found a "conflict" between NEPA and ESA, although not an "irreconcilable and fundamental conflict," based on the possibility that the Secretary might in a hypothetical situation have a duty to designate a particular area as critical habitat regardless of the environmental impacts of doing so.

Yet the court of appeals found no conflict between NEPA and ESA *in this case*. While it is conceivable, as the court suggested, Pet. App. 18a, that there could be a situation where ESA might require the Secretary to make a specific designation to avoid extinction of a particular species regardless of environmental effects, the Secretary did not apply that narrow exception *in this case*, nor, for that matter, did he point to a case where he has ever invoked that exception.

In this case, the Secretary was free to consider any relevant impact, including environmental, economic and social impact, in designating critical habitat for the spotted owl. In making this wide-ranging assessment, the Secretary and the public could have benefited substantially from the development and scientific evaluation of a full range of alternatives that would have been provided by NEPA. The Secretary denied himself and the public this information, to the harm of the process and the final decision, by refusing to comply with NEPA. The Secretary refused to develop or consider any alternatives except the single proposal that ultimately became the final decision.

B. Neither court below ever found that the spotted owl critical habitat designation has no environmental impacts.

Both the federal and environmental respondents argue as if there had been a factual finding in the lower courts that the spotted owl critical habitat designation has no environmental impacts. No such finding was ever made. The court of appeals excused NEPA compliance regardless of the actual environmental impacts of the designation.

When respondent Headwaters argued in the district court that the designation was exempt from NEPA because it had no environmental impacts, the district court rejected the argument on factual grounds: "Headwaters' argument . . . assumes a fact not in evidence. That is, Headwaters' argument assumes that the designation decision will not effect changes in the physical environment. As noted above, that presumption is not necessarily accurate." Pet. App. 55a. The district court explained: "In this case, the designation of critical habitat allegedly has beneficial grounds for the Northern Spotted Owl, but adverse effects on other species and adverse socio-economic effects on the human environment." Pet. App. 56a.

Neither the district court nor the court of appeals ever made a factual finding that no environmental impacts would result from the designation. To the contrary, both the district court and the court of appeals premised their acceptance of Douglas County's standing in this case on the reasonable likelihood that such environmental impacts would in fact occur. Respondents' defense of the decision below on factual grounds is therefore insupportable.

C. There is no factual or legal basis to argue that NEPA does not encompass environmental impacts resulting from federal decisions to "let nature take its course."

Nor is it tenable for respondents to argue either factually or as a matter of Congressional intent that NEPA never applies to environmental impacts that result from a decision to prohibit use or development of large areas of land, or to "let nature take its course." Many federal decisions to prevent human interference or interaction with nature have predictable and potentially catastrophic environmental impacts plainly encompassed within NEPA.

For example, a federal decision to end fire suppression in western forests — to "let it burn" — would greatly increase the harmful environmental impacts of wildfires. A federal decision to end flood control — to "let it flood" — would have disastrous environmental effects on areas that would be exposed to floods. A federal decision to eliminate pest control at the borders or on federal land could have calamitous effects on farming and forestry throughout the country. In this case, as Douglas County showed, the federal decision to permanently preserve 6.9 million acres of forest land for the spotted owl would harm other wildlife species which rely on early-successional forest stages that follow logging.

In addition, preserving large tracts of federal land would lead to more intensive use of remaining unprotected areas of federal land, as well as non-federal land, with major environmental effects on those lands.

These are significant physical impacts on the human environment by any measure. That is why this court's

decision in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), holding that purely psychological impacts are not encompassed within NEPA, does not support the court of appeals' interpretation of NEPA in this case.

The impacts here are on the physical environment. NEPA, aided by the Council on Environmental Quality's regulations, requires federal agencies to look for such environmental impacts on a case-by-case basis through preparation of an environmental assessment, and to prepare an environmental impact statement in cases where significant environmental impacts are found. The court of appeals improperly short-circuited the required process — regardless of the actual impacts of the critical habitat decision — by finding an implied statutory exemption.

The court of appeals' conclusion, urged by the environmental respondents but not the Secretary, was that NEPA does not command federal agencies to identify and analyze the major impacts on the physical environment that result from a critical habitat designation and similar federal decisions to "preserve the environment." This is directly counter to NEPA's direction that all agencies comply "to the fullest extent possible," 42 U.S.C. 4332, and is contrary to *Flint Ridge* and its many progeny in other circuits.

D. The interpretation of NEPA is not influenced by the presumed environmental sincerity of the party seeking compliance with the statute.

The environmental respondents suggest, Brief in Opp. for

Respondent Headwaters at 1-4, and the court of appeals seemed to believe, that the interpretation of NEPA should turn on the environmental sincerity of the party filing the case, and that Douglas County's claim should be rejected because the court presumed that Douglas County is not sincere in its interest in protecting the environment. *See* Pet. App. 28a ("We are reluctant . . . to make NEPA more of an 'obstructionist tactic' to prevent environmental protection than it may already have become.").

There is no language in NEPA, no rule of statutory interpretation, and no judicial precedent from any court that varies the meaning of NEPA or any statute according to the presumed motivation of the party filing suit. The court of appeals' evident (and unwarranted) disapproval of Douglas County's environmental sincerity, and its view that Douglas County's sincerity should influence the interpretation of NEPA, is itself a reason for this court to grant the petition and reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 15th day of December, 1995.

Respectfully submitted,

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